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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 785

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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March 14, 1960

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OCTOBER TERM, 1959.

No. .....

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Eastern Air Lines, Inc. ("Eastern") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case October 7, 1959, rehearing denied December 15, 1959.

Opinions Below.

The opinions and orders of the Civil Aeronautics Board ("the Board" or "the CAB") are not officially reported, but appear in the printed joint appendix used in the Court of Appeals below (1313a-1400a, 1469a-1497a, 1509a-1536a).[1]

The opinion of the Court of Appeals, printed in appendix B hereto, is reported at 271 F. 2d 752 (2d Cir. 1959).

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[1] Unless otherwise indicated, numbers in parentheses refer to pages of the joint appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 7, 1959. Eastern's timely-filed petition for rehearing was denied December 15, 1959. This Court's jurisdiction is invoked under 28 U. S. C. §1254 (1) and 49 U. S. C. §646 (f).

Questions Presented.

1. May the Board, required by statute (Civil Aeronautics Act of 1938[1] §1005 (f), 49 U. S. C. §645 (f); Administrative Procedure Act §§8 (b), 10 (e), 5 U. S. C. §§1007 (b), 1009 (e)) to make adequate findings on the elements of public convenience and necessity before certificating a new air service (Civil Aeronautics Act of 1938 §§2, 401 (d), 49 U. S. C. §§402, 481 (d)) lawfully certificate a new service in a given market but refuse to make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity in the market?

2. Under this Court's "*Ashbacker*" doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327 (1945)), may the Board in an airline new route case, known as an "area proceeding," lawfully refuse to make proper findings upon a timely-raised issue of "mutual exclusivity" as between (a) an application, heard in the proceeding and granted, for extension of existing routes outside the "area" of the case to points within the "area" [Docket 7242 of Northwest Airlines, Inc. ("Northwest") seeking extension of its existing Seattle-Minneapolis-St. Paul-Milwaukee-Chicago route into the Southeast to new

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[1] The Civil Aeronautics Act of 1938, 52 Stat. 977, 49 U. S. C. §§401-705 was replaced in all pertinent parts without material change by the Federal Aviation Act of 1958, 72 Stat. 737, 49 U. S. C. §§1301-1542. References herein to "the Act" shall be to the 1938 Act unless otherwise indicated.

points Atlanta, Tampa and Miami (13a)] and (b) an application, not consolidated in the proceeding, for extension of existing routes within the "area" of the case to points outside the "area" [*e.g.*, Eastern's Docket 7293 seeking extension of Eastern's existing Miami-Tampa-Atlanta-Chicago route to Milwaukee-Minneapolis/St. Paul and Seattle (10a)] where both applications contemplate air service between the same points [between Miami/Tampa/Atlanta and Milwaukee/Minneapolis-St. Paul/Seattle]?

3. Is it lawful for the Board, in airline "new route" proceedings, to announce its determinations, prior to consideration of all relevant and material portions of the record, by "press release," without supporting reasons or consideration of all pertinent and material fact?

4. May the Board, charged by statute (Civil Aeronautics Act of 1938 §401(d), 49 U. S. C. §481(d)) with the duty to find an applicant "fit, willing and able" before authorizing it to engage in air transportation, refuse to consider as an element of the carrier's "fitness" the timely-raised question whether the carrier, by instigating an agent to make *ex parte* representations to the Board on its behalf, violated section 7 of the Administrative Procedure Act (5 U. S. C. §1006) and section 300.2 of the Board's Principles of Practice (16 F. R. 2932, March 30, 1951) and was therefore unfit, or comparatively less fit than other applicants, to engage in air transportation under the Act?

Statutes Involved.

Involved in this case are the Fifth Amendment to the United States Constitution, sections 2, 401, 1005(f) and 1006(a) of the Civil Aeronautics Act of 1938 (52 Stat. 980, 987, 988, 1023, 49 U. S. C. §§402, 481, 645(f), 646(a)), and

sections 3(a), 7(c), 7(d), 8(b), 10(a), and 10(e) of the Administrative Procedure Act (60 Stat. 237, 241, 242, 243, 5 U. S. C. §§1002(a), 1006(c), 1006(d), 1007(b), 1009(a), 1009(e)). These sections are printed in Appendix A hereto.

Statement of the Case.

This matter originated as a "new route" proceeding before the Board known as the *Great Lakes-Southeast Service Case.*

Eastern is a certificated air carrier, authorized to engage in air transportation between (*inter alia*) Chicago and Florida, between Detroit and Florida, and between Cleveland, Pittsburgh and Florida, all three routes including intermediate points. Prior to the Board's decision in the proceeding before it (1313a-1400a), Eastern competed with Delta Air Lines, Inc. ("Delta") between Chicago and Florida, but no other carrier was authorized between Detroit and Florida nor between Cleveland, Pittsburgh and Florida. The Board's decision authorized Northwest to operate between Chicago, Atlanta, and Florida, Delta to operate between Detroit and Florida, and Capital Airlines, Inc. ("Capital") between Cleveland, Pittsburgh and Florida (and also between Buffalo and Florida, where previously there had been no certificated service, but for which authority Eastern had applied, that Eastern application being denied by the Board's order). All of the new certifications were competitive with Eastern.

Long prior to the institution of the proceeding before the Board,[1] Eastern had applied (application under Docket

[1] Actually, Eastern's Docket 7293 was filed after the Board's Chief Examiner issued a notice of prehearing conference (1), but before the Board issued its first consolidation order in the case (79a-90a). Eastern's Docket 3207 had originally been filed in 1947, *eight years before* activation of the proceeding before the Board.

3207) for routes between Chicago and Milwaukee and Minneapolis/St. Paul ("Twin Cities")(8a) and (Docket 7293) between Chicago and Seattle via intermediate points, both applications being for routes competitive with Northwest's existing authority (10a).

In response to the notice of prehearing conference (1), various carriers, including Northwest, filed applications for Chicago-Florida authority. Delta and others sought Detroit-Florida authority and Capital and others sought Cleveland-Pittsburgh-Florida authority. All requested that their applications be considered in the proceeding. Eastern requested that the proceeding be strictly limited in scope and not include issues of traffic moving beyond Chicago but, in the event that the needs for service of traffic moving between points within the "area"[1] and points outside the "area" north and northwest of Chicago were put into issue by consolidating into proceeding such applications as Northwest's Docket 7242, consolidated and concurrent hearing be granted Eastern's Dockets 3207 and 7293, since those applications were "mutually exclusive" within the meaning of the *Ashbacker* doctrine of Northwest's application (95a-97a; see also 24a-25a, 27a). Pursuant to Eastern's applications, Eastern would have been authorized to offer services identical to those proposed by Northwest.[2]

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[1] Defined by the Board as "the area extending from Chicago, Ill., Detroit, Mich., and Buffalo, N. Y., on the north, Indianapolis, Ind., Louisville, Ky., and Atlanta, Ga., on the west, Washington, D. C. and Baltimore, Md., on the east and Miami and Tampa, Fla., on the south." (84a.)

[2] Northwest's *existing* Seattle-Twin Cities-Milwaukee-Chicago *authority* plus its *application* for Chicago-Florida authority if not restricted permitted Northwest to offer Seattle, Twin Cities, and Milwaukee service via Chicago to and from Florida (not previously authorized to any carrier). Eastern wished to combine its *existing* Chicago-Florida *authority* with its Chicago-Milwaukee-Twin Cities-

The Board refused to consolidate the above-described Eastern applications,[1] but it did include the Northwest application to duplicate Eastern between Chicago and Florida (13a, 89a).[2] Other applications of other carriers, principally for authority competitive with Eastern, were also consolidated into the proceeding. Certain Eastern applications proposing new routes wholly within the area were also consolidated.

On April 28, 1956, prior to the hearing before the Board, Eastern sought review of the Board's consolidation order in the Court of Appeals for the District of Columbia Circuit, alleging that the Board's order did violence to the *Ashbacker* doctrine and requesting that court to direct the Board to hear Eastern's excluded applications for Florida-Milwaukee-Twin Cities-Seattle authority in any proceeding that might consider Northwest's applications for Seattle-Twin Cities-Milwaukee-Chicago-Florida authority. The Court of Appeals dismissed the petition for want of jurisdiction, explaining that the orders complained of were interlocutory and not ripe for review. However, the Court

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Seattle *applications* to offer Seattle-Twin Cities-Milwaukee-Florida service via Chicago. Both Eastern's and Northwest's applications sought to combine existing with applied-for routes in order to operate between points within the "area" and points outside the "area." The only difference was that Eastern's *existing* authorizations were within the "area," and Northwest's were outside the "area," and Eastern's applied-for authority was *outside* the "area," while Northwest's application was for new authorizations *within* the "area." Eastern wished to go north and west into the Northwest from the Southeast, while Northwest wanted to proceed south and east into the Southeast from the Northwest.

[1] Eastern repeatedly urged the "mutual exclusivity" of its applications with Northwest's and sought their consolidation into the case. (See, *e.g.*, 24a-25a, 27a, 33a-36a, 96a-97a.)

[2] The Northwest application did not contemplate point-to- duplication of every Eastern city on the Chicago-Florida ro ut it did include the major cities which contribute the bulk the traffic support for the route.

in *dicta* extensively explained that it did not disapprove of the Board's action, and indicated that where an "area" proceeding would become a transcontinental case, *Ashbacker* would not apply. *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956). The Court below ruled that that case was not *res judicata* (App. B, p. B4, n. 8).

The proceeding went to hearing before an Examiner of the Board. Prior to the hearing, Eastern had requested Northwest to supply load factor data (relationship of seats available to seats occupied) for its Chicago-Twin Cities-Seattle route; however Northwest refused to supply those data. At the hearing, Eastern again requested Northwest to submit those load factor data, and when the carrier refused, Eastern attempted to subpoena (273a) the information, pointing out that those materials were relevant to numerous issues, including that of "mutual exclusivity" (176a, 184a-186a). The Examiner refused to issue the subpoenas, ruling, *inter alia,* that the data sought were not relevant to any of the issues in the proceeding (187a-189a, 192a).[1] Eastern also cross-examined Northwest's witnesses about the ability of the Seattle-Twin Cities-Milwaukee-Chicago-Florida route to sustain more than one carrier. Northwest's witness refused to testify that the route would economically support two carriers (178a-184a), and no party offered any evidence that the route described could economically sustain the operations of two carriers.

Briefs were filed with the Examiner, Eastern requesting the Examiner to make findings on the issue of "mutual exclusivity" between Eastern's applications and Northwest's, pointing out that the record on the issue was incomplete, because, among other things, it lacked essential load factor data on Northwest's operations (515a-17a). The

[1] The Board upheld the Examiner (1484a-85a).

Examiner made no findings on the "mutual exclusivity" question in his Initial Decision (591a-974a).

Exceptions to the Examiner's Initial Decision and Briefs were filed with the Board.

One of the most provocative issues of the proceeding before the Board was whether Capital's equipment situation was such that the carrier was unfit to undertake additional route responsibilities. The Board's Bureau of Air Operations (which serves in a kind of *amicus curiae* capacity) had taken the position before the Examiner that Capital should be selected for the Buffalo-Miami route, but subsequently concluded that "because of a change in the equipment program of Capital" (*i.e.*, cancellation of order for jet aircraft) another carrier should be selected for the route (1043a-45a). On January 27, 1958, the day before oral argument was heard by the Board, the president of an aircraft manufacturer sent a telegram to the Chairman of the Civil Aeronautics Board "at the suggestion of Capital" advising that the manufacturer had entered into an agreement with Capital to sell the carrier 15 jet aircraft and to lease to it additional piston-engined equipment (1498a). At the oral argument, Counsel for the Bureau of Air Operations again reversed his field and supported Capital for the Buffalo-Miami route (for which Eastern was also an applicant).

On March 19, 1958, the Board commenced deliberations in the case below, the *St. Louis-Southeast Service Case*,[1] CAB Docket 7735 *et al.*, and others deferred for simultaneous consideration. Deliberations continued March 25, 26 and 27 (1571a-85a).

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[1] Petitions for *certiorari* are also pending in this Court with respect to the decision of the Court of Appeals for the District of Columbia Circuit, which reversed in part and affirmed in part the decision of the Board in the *St. Louis-Southeast Service Case* (October Term, 1959, Nos. 679 and 777).

On March 26, 1958, the Board announced by press release, without supporting reasons, its determinations to grant Northwest a route between Chicago, Atlanta, Tampa/St. Petersburg ("Tampa") and Miami, authorizing for the first time service between Seattle, Twin Cities, Milwaukee and Atlanta and Florida, Delta a route between Detroit, Atlanta, Tampa and Miami, and Capital a route between Cleveland, Pittsburgh, Atlanta, Tampa and Miami, all in competition with Eastern.[1] Capital was also authorized to become the first and only carrier operating between Buffalo and Florida (an authorization also sought by Eastern, but denied to Eastern by the Board.) (1275a-76a).

On October 2, 1958, the Board released its formalized decision (1313a-89a) giving reasons for the Northwest, Delta and Capital awards previously announced in its press release. With respect to the Chicago-Miami route awarded Northwest, the Board stated generally that the market was large and was growing and could sustain three carriers. It did not measure anticipated revenues against anticipated costs of operations in that market, however (1320a-37a), nor did it make any findings on the issue of "mutual exclusivity" raised by Eastern. With respect to the Capital award, the Board noted it agreed with the Examiner that the route should be awarded, pointing out that 285 passengers daily moved between Cleveland and Miami, and 195 between Pittsburgh and Miami (1337a-43a). Again, there was no balancing of revenues against expenses. The Board's reasons for granting Delta a Detroit-Florida route (and other authorities competitive with Eastern) are not localized in the formal opinion, but are scattered in various portions of the decision. Again, however, the Board

[1] The Delta and Capital awards also included some other points, again principally competitive with Eastern (1276a-81a).

made no findings to balance the revenues it may have expected Eastern and Delta to receive against the expenses it expected them to incur on the routes.

Eastern and others petitioned the Board for reconsideration. Eastern pointed out that the Northwest award violated the *Ashbacker* doctrine since Eastern had not been heard on its application for the authority granted Northwest (1436a-40a, 1458a-59a) and using the Board's own findings on the volume of traffic that Northwest would carry between points within the "area" and points outside the "area" Eastern showed that the route would not sustain two *schedules*, much less two *air lines* (1438a). Eastern also showed that Northwest's Chicago-Florida award was not based on adequate and lawful findings (1440a-60a). Eastern showed that operations by three carriers on that route (Northwest in addition to Eastern and Delta) would be uneconomic (1443a-52a), pointing out particularly that the Board had failed to balance traffic against capacity to be offered by all carriers, and that, by the Board's own findings as to the size of the market, each of the three carriers operating only one round trip per day would operate at marginal or money-losing load factors (1447a-51a).

Pursuant to section 1006 of the Civil Aeronautics Act (49 U. S. C. §646) Eastern filed in the Court of Appeals for the Second Circuit a petition for review (1544a-85a), and a petition for stay, of the Board's order.[1] The stay was subsequently denied on December 11, 1958, and the Court of Appeals issued its decision on the review questions October 7, 1959. On October 22, 1959, Eastern timely

[1] Capitol Airways, Inc. ("Capitol") and the City of Nashville, Tennessee prosecuted appeals as well as Eastern. National Airlines, Inc. ("National") filed, and subsequently dismissed, a petition for review.

filed a petition for rehearing which was denied by the Court on December 15, 1959.

The Court below discussed at length Eastern's *Ashbacker* claims respecting the Northwest award but ruled that "mutual exclusivity must be established" (App. B, pp. B5-B6) and held that Eastern had failed to show mutual exclusivity (App. B, pp. B5-B6). The Court stated:

> "We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made." (App. B, p. B6).

The Court also noted that when Eastern appealed the Board's consolidation order to the Court of Appeals for the District of Columbia, that tribunal had suggested "that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings" (App. B, p. B4, n. 8). However, in view of its holding, the Court below did not pass upon the possible inapplicability of *Ashbacker* (App. B, p. B4, n. 8).

With respect to Eastern's contention that the Board had failed to make appropriate findings on the sufficiency of the Chicago-Florida, Detroit-Florida and Cleveland/Pittsburgh-Florida markets to support additional carriers, the Court stated: "We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence" (App. B, p. B10). Eastern respectfully submits the Court below never focused upon the problem. It is true the Board did make certain findings as to the size of the markets involved, but it never examined the other side of the coin, namely, the capacity that would be offered to

serve the traffic. Eastern's point was that the Board is required to make appropriate findings upon *expenses* (capacity) as well as *income* (traffic) and to balance the two in order to arrive at a rational, logically and legally sound conclusion that a given market is of sufficient size to support additional carriers. That was the crux of the issue; but the Court below never disposed of it (see, *e.g.*, Eastern's Petition for Rehearing below, dated October 22, 1959, at p. 17).

The Court discussed at some length Eastern's contention that the Board had unlawfully prejudged the case by announcing by press release, without supporting reasons, its determinations to award the Northwest, Delta and Capital routes. While expressly not approving the practice, the Court held that Eastern's claim of prejudgment was unsound, apparently because Eastern did not claim that the interval between oral argument and the Board's tentative decision was so short as to preclude thoughtful consideration of the evidence, and because the Board, in its formalized decision (issued six months after its press release decisions) might have reached different results if the work of drafting the opinion indicated that a different decision was proper (App. B, p. B7). Eastern submits that the Court below erred in its holdings.

The Court below also discussed Eastern's contentions, regarding Capital's *ex parte* representations to the Board (detailed by Eastern in its Amendment to Motion to Reopen the Record before the Board, 1289a-92a, and its Petition for Review to the Court below, 1562a-63a), that Capital exerted improper *ex parte* influence upon the Board and otherwise prejudiced Eastern by not opening the facts to cross-examination and rebuttal. The Court below accepted the Board's assurances that the decision was not influenced by Capital's action. Moreover, it held the communication

was not improper because it was relevant to Board functions unconnected with the *Great Lakes-Southeast Case*, an entirely erroneous conclusion, Eastern submits, which should have at least been tested in hearing before the Board. Finally, the Court held that "there is no indication that Capital made any covert communication to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F. 2d 418 (D. C. Cir. 1958), is inapposite." (App. B, pp. B8-B9.) Eastern submits that the Court erred in the premises.

Reasons for Granting the Writ.

Over twenty years ago, Congress enacted the Civil Aeronautics Act of 1938 for sound regulation of the then-infant air transport industry. That Act was superseded without material substantive change by the Federal Aviation Act of 1958.[1]

New authority to engage in air transportation has been granted under a statute, section 401 of the Act, that has remained unchanged for more than twenty years and has never been definitively interpreted by this Court; nor, indeed, has it ever been squarely reviewed by any Court. Under that Act, the air transport industry has matured into the nation's number one common carrier of intercity traffic. (ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD FOR 1958, 2.) Some 50,000,000 persons flew on commercial air lines in 1958, and the air lines that year did a $2,900,000,000 business, compared with 1,306,000 passengers and $57,000,000 twenty years before in 1938. (*Ibid.*) That growth has been marked by varying and inconsistent interpretations of section 401 of the Act, and a noticeable lack of uniform application of

[1] See p. 2, n. 1, *supra*.

the interpretations placed on it by the Board. The confusion is understandable in view of the absence of any guidance from an authoritative Court.

New route cases now must be increasingly concerned with multiplication of existing services, and unsuccessful litigants will necessarily be seeking more frequent recourse to the Courts, unless this Court establishes some definitive guidelines for the instruction of the Board and the parties to proceedings before it.[1]

More and more, parties to Board proceedings, the Board, and the lower Courts will be confronted with problems identical, or similar, to those raised, but not resolved, by the decision below. This case, for example, may be considered a kind of "companion case" to Number 777 in this Court, *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* wherein Eastern has asked this Court to review the decision of the Court of Appeals for the District of Columbia Circuit on review of the Board's decision in the *St. Louis-Southeast Service Case.*[2] The Board proceedings involved the same and contiguous areas of the country, were considered and decided simultaneously by the Board, resulted in additional competition for Eastern, in each the Board committed the same legal errors, the same basic problems, all relating to section 401, were presented in Eastern's allegations of error

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[1] This does not say that the Act has not been before the Courts; it has produced its share of litigation, but §401 has never been squarely or broadly interpreted. The *Ashbacker* doctrine as applied to airline cases presents basically a §401 problem since it is concerned with the right to a fair hearing, and *Ashbacker* has probably contributed as much to recent case literature in Federal practice as any other legal doctrine, in view of its application to airline, radio, television, pipeline and other competitive Federal licensing.

[2] Trans World Airlines, Inc., ("TWA") is also seeking *certiorari* in this Court to review the *St. Louis Case. Trans World Airlines, Inc.* v. *Delta Air Lines, Inc., et al.,* October Term, 1959, No. 679.

in the appeals to the respective circuits, but the approaches by the respective Courts to Eastern's contentions were divergent (and, in at least one instance, in direct conflict), reflecting a disparity of views, and a need for authoritative direction by this Court.

Section 401 prescribes the manner in which air routes are granted and amended. It provides for hearings on applications for new route authority, and states that an application is to be granted if the route sought is required by the "public convenience and necessity", and the applicant is "fit, willing and able" to provide the air transportation proposed.

This petition urges this Court (1) to clarify for the Board, and for parties to proceedings before it, the Congressional intent behind the term "public convenience and necessity" and, as well, to state what findings are essential to sustain a conclusion that a new route is required by the "public convenience and necessity"; (2) to clarify the meaning of this Court's *Ashbacker* doctrine; (3) to reaffirm the right of a party to administrative proceedings to have his case judged on the merits following full consideration of all material and relevant facts, and without prejudgment publicly proclaimed and relentlessly defended; and (4) to define the limits of proper conduct for parties to administrative proceedings, setting forth for the Courts and administrative tribunals the sanctions for *ex parte* or other conduct exceeding the bounds of propriety and explaining the appropriate consideration of the qualifications of a party that offends the requirements of decency.[1]

Each of these matters is increasingly involved before the Board, and the Courts of Appeal, and with increasing

[1] The first three problems are presented for this Court's attention in *Eastern, supra*, No. 777. *TWA, supra*, No. 679, raises the *Ashbacker* issue.

inconsistency of treatment. Eastern respectfully submits that unequivocal guidance by this Court on these problems will materially assist the lower Courts, the Board, and parties before the Board in the avoidance (or speedy and just disposition) of those problems in the future.

I.

It Is In The Public Interest For This Court To Clarify The Requirements Of The Standard Of "Public Convenience And Necessity" In Air Route Cases.

Under sections 401(d)(1) and 401(h) of the Act, the Board must find a route required by the "public convenience and necessity" before it can be certificated.

No Court has ever determined what basic findings of public convenience and necessity are essential for a lawful disposition of an application for a new or amended certificate to engage in scheduled air transportation.

As to Eastern's contentions that the Board had not made proper findings on the economic sufficiency of various markets to support additional carriers, the Court below stated that "the Board's findings on size of market . . . [are] . . . adequately stated and supported by substantial evidence" (App. B, p. B10). Eastern submits that the Court's statement is no answer to the problem. It focuses only on the bright (revenue) side, and totally ignores the grim economic realities (costs), and it would relieve the Board of the unpleasant duty of determining how much particular services would cost.

Eastern presented to the Court below the proposition that a lawful finding of public convenience and necessity must include a finding weighing the size of a market against the capacity to be offered by all carriers, and the costs to

all of serving it. The Board admittedly made some findings on the volume of traffic in several markets, but it never related those volumes to the expenses that would be incurred.

Eastern submits that the Court of Appeals for the District of Columbia Circuit expressed the law properly; albeit in generalities, in *American Airlines, Inc.* v. *Civil Aeronautics Board,* 192 F. 2d 417, 421 (D. C. Cir. 1951):

> "governmental permissions for the future cannot be fashioned from pure fantasy, speculation devoid of factual premise. Public convenience and necessity in the sense of those statutes has a hard core of factual possibility which can be ascertained and evaluated only upon the basis of present and past events and conditions."

Any speculations about "size of the market" are meaningless unless related to estimates of the costs of serving those markets. This was recognized by the Board less than a year ago in the *South Central Area Local Service Case,* CAB Docket 7939 *et al.*, where the Board stated (CAB Order E-13648, mimeo. op. 62, Mar. 21, 1959):

> "in arriving at its decision on new route proposals the Board must evaluate all the traditional elements of public convenience and necessity, such as public need for the service, *potential traffic,* benefits involved, *cost of operation, commercial revenues,* subsidy requirements, *diversion,* etc." (Emphasis supplied.)

The record of every Board new route proceeding contains masses of documents compiling statistics with one end in view: to show that the applicant will serve a substantial segment of the traveling public at a sufficiently low cost to enable him to realize a profit, while his oppo-

nents will not serve as many passengers, or will lose money in the contemplated operation, or both. Invariably, these "revenue and expense" forecasts are requested by Bureau Counsel[1] to be supplied, the Examiner directs their submission, and the parties respond. Those estimates are the vitals of any presentation, and the proceedings below before the Board were no exception. The Examiner in his initial decision adverted to the revenue and expense estimates submitted by the parties (*e.g.*, 634a-38, 646a-48a, 649a-51a, 654a, 661a-63a, 672a-80a, 697a-702a, 711a-12a, 714a, 715a-17a, 718a-21a, 727a-29a, 739a-44a, 754a-56a, 758a, 761a-64a, 768a) but he made *no* findings or conclusions on the basis of those forecasts. Neither did the Board make findings on the forecasts submitted by the carriers of traffic they would expect to carry and the costs they anticipated they would incur in transporting it.

Eastern submits it is not enough for the Board to say, although the Court below apparently endorsed the approach, only that a particular market has so many passengers to justify certificating an additional air line to carry them. It must proceed from that point to determine the expenses that will accompany the transportation of that traffic by the carrier seeking to serve it and balance that traffic and those revenues against the capacity that will be offered and the costs that will be incurred, to determine rationally whether the public convenience and necessity require the proposed new service. The approach of the Court below would preclude any judicial review of any conclusion advanced by the Board that the public convenience and necessity required a service because the market was large enough. It is beyond the competence of a Court to substitute its judgment for that of the Board on the

[1] Counsel for the Board's Bureau of Air Operations (see p. 8, *supra*).

significance of "size of market," *but,* if the Board is required also to make findings as to expenses of serving the market, it is then possible to determine the basis upon which the Board acted and whether it reached a lawful and reasonable conclusion.

The Court is respectfully requested to define the requirements of lawful findings on the elements of the "public convenience and necessity".

II.

It Is In The Public Interest For This Court To Clarify Its *Ashbacker* Doctrine In Air Route Cases.

The *Ashbacker* doctrine is a concrete application of the notion that the right to a hearing under sections 401(c) and 401(h) of the Act is a right to a fair hearing. In its simplest terms, *Ashbacker* recognizes that where two parties desire a license for a facility that can be granted to only one, the due process right to a fair hearing requires that both applications be heard and determined concurrently. This Court stated in *Ashbacker* v. *FCC, supra* (326 U. S. at 327):

> "where two *bona fide* applications are mutually exclusive the grant to one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."

A. The Problem is Significant and Spreading.

The Courts have struggled with the application of *Ashbacker* to air route cases[1] for over 10 years, and at a rate of

[1] The Court of Appeals for the District of Columbia declaring *Ashbacker* applicable to an air route case stated that: ". . . *Ashbacker* [is] a rule of substance and not . . . a mere prescription of form." *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17, 21 (1955).

slightly more than one case per year parties have appeared in Courts of Appeals urging application of the doctrine.[1] It arises in every Board proceeding of any consequence and the Federal Power Commission and the Federal Communications Commission contend with it as well.

B. The Confusing Decisions Below Are in Conflict.

A bewildering array of verbiage greets the researcher into the *Ashbacker* problem. Some of the difficulties are outlined by the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* F. 2d , 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959), printed as Appendix C hereto (see, *e.g.*, C6-C9), but the conflicts within that decision itself have made it a fecund source of certiorari petitions (numbers 679 and 777, October Term, 1959, *supra*). That decision illustrates some of the conflicts in the applicability of *Ashbacker* to various factual situations (and it also reveals a reversal of direction by the District of Columbia Circuit from the

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[1] *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 178 F. 2d 726 (D. C. Cir. 1949); *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 181 F. 2d 777 (D. C. Cir. 1949); *Western Air Lines, Inc.* v. *Civil Aeronautics Board,* 184 F. 2d 545 (9th Cir. 1950); *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 194 F. 2d 339 (D. C. Cir. 1952); *United Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 13 (D. C. Cir. 1955); *Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17 (D. C. Cir. 1955); *North American Airlines, Inc.* v. *Civil Aeronautics Board,* 241 F. 2d 445 (D. C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 243 F. 2d 607 (D. C. Cir. 1956); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* 247 F. 2d 562 (D. C. Cir. 1957); *National Airlines, Inc.* v. *Civil Aeronautics Board,* 249 F. 2d 13 (D. C. Cir. 1957); *Delta Air Lines, Inc., et al.* v. *Civil Aeronautics Board,* ..... F. 2d ....., 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959) (now pending in this Court under Nos. 679 and 777, October Term, 1959), and this case below. All of these cases involved *Ashbacker* considerations and the *Ashbacker* case was cited in each one except the first *Eastern* case.

trend indicated by that Court in *Eastern, supra,* 243 F. 2d 607 (D. C. Cir. 1956)).[1]

The 1959 *Delta* case, *supra,* presents a square conflict with the holding of the Court below on procedural aspects of *Ashbacker.* The District of Columbia Circuit in *Delta, supra,* ruled that where a party had made a *prima facie* showing of mutual exclusivity, the *Ashbacker* doctrine applied (App. C, p. C14). In that case, in its petition for reconsideration before the Board, Eastern had shown, using the Board's own findings, that grant to TWA of a West Coast-St. Louis-Florida routing would preclude subsequent grant of that route to Eastern or anyone else (App. C, p. C19). The Court held that in those circumstances, "the Board's failure to make the necessary specific findings [on *Ashbacker*] deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board*" (App. C, pp. C19-C20).

Eastern made *precisely* the same showing in its petition for reconsideration before the Board in the proceedings below as it had made at the same point in time in the *St. Louis Case* (compare 1438a-39a with 618-19 of joint appendix used in *Delta* in the District of Columbia Circuit, and certified to this Court in Numbers 679 and 777, October Term, 1959), yet the Court below held that Eastern had made no showing of mutual exclusivity and that the Board could ignore Eastern's claim (App. B, pp. B5-B6).

In each case, on the same set of facts, *mutatis mutandis,* the Board had urged before the respective Courts that

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[1] When Eastern appealed the Board's consolidation order in the *Great Lakes Case* to the District of Columbia Circuit, that Court indicated that *Ashbacker* was not applicable when it would transform a "limited area proceeding" into a transcontinental case. Some three years later, in *Delta,* that same Court, and basically the same panel, held *Ashbacker was* applicable when a "limited area case" would become a transcontinental proceeding. Compare 243 F. 2d at 609 with App. C, p. C20; see also C14, C18, and B4, n. 8.

Eastern had not shown "mutual exclusivity" and it was therefore not required to make findings on the issue. The Court below adopted the argument and disallowed Eastern's *Ashbacker* claims (App. B, pp. B5-B6), while the Court of Appeals for the District in *Delta* rejected the Board's argument, and remanded the case to the Board to make adequate findings on mutual exclusivity (App. C, pp. C19-C20). Eastern submits that the Court of Appeals for the District of Columbia Circuit is right and the Court below was in error.

The conflict between these two cases is square and irreconcilable. This Court is respectfully requested to settle the question, find that the Board violated *Ashbacker*, and remand the case to the Board, and, at the same time, explain for the guidance of all the application of *Ashbacker* to air route cases.

III.

It Is In The Public Interest For This Court To Review The Board's Practice Of Prejudging Cases Through Its Press Release Decision Procedure.

Eastern contended in the Court below that it was denied fair hearing because the Board prejudged the issues of the proceeding and announced awards of valuable route authority to Northwest, Delta and Capital competitive with Eastern without giving supporting reasons and without considering all material facts. By publicly proclaiming its determinations by press release the Board fettered its discretion and precluded any open-minded consideration of the facts in the preparation of its formal decision.

Shortly after the Board's deliberations on the case, it announced its "tentative" decisions to award the North-

west, Delta and Capital routes (1275a-76a). Some six months later, it released its formalized decision announcing the reasons for the awards (1313a-1400a). The reasons supporting the award were based upon air traffic survey and financial data *which were not even in existence at the time of its press release decisions.* The use of those data was obviously considered by the Board essential to its decision. For example the Board relied upon 1957 air traffic survey data as the *principal* support for *every* major route award in the case, and, as well, for the denial of certain Eastern applications[1] (1321a, 1322a, 1324a, 1325a, 1328a, 1329a, 1333a, 1334a, 1337a, 1339a, 1344a, 1346a, 1347a, 1348a, 1472a, 1476a, 1477a, 1480a, 1481a, 1486a, 1487a). Indeed, the Board also referred to *June, September* and *October,* 1958 traffic data—obviously not available in *March,* 1958—to sustain its position (1473a). In support of the finding that Capital was "fit, willing and able" the Board stated it relied on 1958 financial data (1340a-41a), also not available in March, 1958.

Rule 36 of the Board's Rules of Practice[2] provides that, in making its decisions, the Board will consider the whole record, the Examiner's Initial Decision, and the exceptions to it, will resolve all issues of fact by the greater weight of the evidence and *then* issue an appropriate order. It has been judicially stated, *Saginaw Broadcasting Co.* v. *Federal*

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[1] It is interesting that the Court below stated that it had examined the Board's findings on the "size of the markets" and found those findings adequately stated and supported by substantial evidence. (App. B, p. B10). See discussion at 11, 16, 18-19 above. Yet those findings were based almost entirely on *1957* data not available when the Board prejudged the case by its March 26 and 31, 1958 press release decisions.

[2] Published in conformity with §3(a) of the Administrative Procedure Act, which also requires the Board to adhere to its rules as published.

Communications Commission, 96 F. 2d 554, 559 (D. C. Cir. 1938), that

> "the process which a commission properly follows in reaching a decision . . . necessarily includes at least four parts: (1) evidence must be taken and weighed, both as to its accuracy and its credibility; (2) from attentive consideration of this evidence, a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

The Court below accepted the Board's assertions that its "press releases" were its "tentative decision" only, and subject to change (App. B., p. B7). However, section 8(b) of the Administrative Procedure Act requires that *all* decisions, including *"tentative"* decisions must contain findings and conclusions as well as the reasons or basis, therefor, upon all the material issues of fact, law, or discretion presented on the record.

The "press release" procedure pervades the Board's entire decisional process, it has been vigorously attacked as unlawful by one member of the Board, and was manifestly viewed by the Court below with considerable disapproval (App. B, p. B7). This Court is respectfully requested to declare the procedure invalid.

A. The Press Release Decision Procedure Has Far-Reaching Consequences.

Perhaps the best exposition of the wide-ranging effects of the "press release" procedure is set forth in Board Member Hector's dissenting opinion on reconsideration below (1521a-23a). It is there pointed out that, since

August, 1956, *all* major Board cases have their results foretold several months in advance of the formal order by "press release," that the formal decision invariably conforms in all major particulars with the announced predeterminations, that parties commence actions in reliance on the "press release," and that the Board loses its freedom of action to consider the case on its merits once the formal opinion is being prepared by the Board's opinion-writing staff for the Board's approval.

The Board itself admits that the situation represents an unhappy compromise arising out of an alleged necessity to prevent "leaks" (App. B, p. B7, n. 10).[1] If this Court will not call a halt to it, its use will spread to all administrative agencies adjudicating controversial matters attracting wide-spread public attention.[2]

Further, much future litigation will surely result, arising not only from Board proceedings[3] but also from other agencies. Unless and until the process is stopped, litigants before administrative agencies will be subjected to adjudi-

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[1] The very excuse that the Board cannot control untrustworthy participants in its decisional process should condemn the decisions themselves as being infected with impropriety.

[2] In point of fact, the Federal Communications Commission adopted the practice shortly after the Board's first experimentations with it. See FCC Public Notice 41611, February 7, 1957, "FCC To Announce Instructions In Docket Cases." A broadcast industry trade magazine explained that the Commission, like the Board, had been plagued with "leaks" in important television license and deintermixture proceedings and was adopting the Board's practice to combat the problem. 52 BROADCASTING 65 (Feb. 11, 1957).

[3] On February 15, 1960, a petition for review of a Civil Aeronautics Board Order was filed in the District of Columbia Circuit Court of Appeals where the petitioner alleged, *inter alia*, that the Board's "press release" procedure had prejudiced it. The "press release" itself was not included as an assignment of error, however. *Southeastern Aviation, Inc.* v. *Civil Aeronautics Board*, No. 15566 D. C. Cir., Petition for Review 6, subpara. (m).

cation by "press release"—an anathema upon any concepts of due process of law.

B. The Press Release Decision Procedure Is Unlawful.

The above discussion of the wide-spread use of the "press release" decision practice has touched on its illegality. It permeates the administrative process and deprives litigants of their rights to fair hearings and determinations of their cases fairly considered upon the records. Member Hector manifestly regarded the practice as unlawful and repeatedly said so (see, *e. g.*, 1521a-23a) and it is impossible to reconcile it with the requirements of the Administrative Procedure Act and Rule 36 of the Board's Rules of Practice. In fact, the Court below expressed considerable difficulty with the practice, and indicated disapproval (App. B, p. B7).

The Board in its deliberations sits as a fact-finding jury and it is axiomatic that jurymen should not announce their "tentative" conclusions prior to consideration of all the evidence. It was stated in *Pool* v. *C. B. & Q. R. Co.*, 6 Fed. 844, 850 (D. Iowa 1888) (ordering new trial because of juror's misconduct):

> "Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juror talks outside the jury room about a case pending and undecided before him, he gives the clearest evidence that he is not an impartial and unbiased juror. The very discussion of any matter by a juror elsewhere than in the jury room tends to the forming of false

> impressions and prejudgments. Nor will it do for a moment to accept the statement of the juror that what he has said or heard has not affected or influenced his judgment."

This Court can take judicial notice of human nature, as described in the passage quoted.[1]

Member Hector has pointed out that the Board (and probably other agencies as well) reach a decision and then turn the result over to a staff of professional opinion writers to justify the conclusion:[2]

> "It has happened that the agency members say to the opinion writers: 'Here's the answer. Go write it up in good legal style.' . . . Members are inevitably tempted to make decisions as a simple fiat and to leave it to professionals to figure out the reasons why."

Eastern's objections to the "conclusion-to-premise" approach inherent in the Board's "press release" proce-

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[1] It should be made clear that there is nothing but the most superficial resemblence between the "press release" practice and the rarely-used practice of this Court, and other courts, appearing sometimes in extraordinary circumstances, of announcing a *final* judgment before there has been sufficient time to reduce the judgment to writing. For example, in the *Little Rock School Case, Cooper* v. *Aaron*, 358 U. S. 1 (1958), this Court made it abundantly clear that it was announcing its *final judgment* after "having fully deliberated" on the issues and that the imminence of the new school year at Little Rock coupled with the physical impossibility of reducing the Court's already carefully reasoned decision to writing made it "important to make prompt announcement of our judgment." The "press release" decision practice of the Board is not even remotely comparable. This Court did not, and it is submitted would not, announce that it had "tentatively" decided to issue its order, but that it would make up its mind definitely and publish its opinion later after it had had time to look at the record in the case. The Court below did not confuse the two practices.

[2] Hector, *Government by Anonymity: Who Writes Our Regulatory Opinions?*, 45 A. B. A. J. 1260, 1264 (December, 1959).

dure is no mere insistence on procedural niceties. The reasons for requiring all ratiocinative processes to *precede* decision are basic to jurisprudence. The Court in *United States* v. *Forness*, 125 F. 2d 928, 942 (2d Cir.), *cert denied*, 316 U. S. 694 (1942) said:

> "It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty. Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that opinion on paper."

In another case before it, the Court below criticized the SEC for issuing a "press release" announcing the Commission's intentions prior to a hearing, and clearly indicated that it would have reversed the Commission if the aggrieved party had not waived his objection to the prejudgment. The Court stated (*Gilligan, Will & Co.* v. *Securities & Exchange Commission* 267 F. 2d 461, 468-69 (2d Cir. 1959)):

> "the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

Eastern submits that precisely the same considerations are applicable here: the Board announced by "press release" its determinations prior to "hearing" or con-

sidering the facts upon which it ultimately based its award, namely the 1957 and 1958 traffic and financial data. The Court below did not consider Eastern's contentions in that light.

With respect to Eastern's claim of prejudice from the "press release", the Court below stated (App. B, p. B7):

> "We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing."

In approving the Board's "press release decision" practice, the Court below misunderstood the facts and misapplied the law. Perhaps the Board did, as the Court stated, consider the evidence before it at the time of the "press release" decision. The significant fact, however, is that the reasons the Board set out to justify its decision *ex post facto* related to materials that were *not* before the Board when it made its predeterminations. Member Hector's criticism of the delegated opinion-writing process (Hector, *Who Writes Our Regulatory Opinions, supra*) confirms the proposition asserted by Eastern, namely, that the Board made up its mind, told its opinion writers to justify its predeterminations, and the opinion writers merely adapted the facts to suit the pre-conceived decision. Member Hector's criticism also answers the Court's second

point, namely, that "if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision." Member Hector pointed out (Hector, *supra*, 45 A. B. A. J. at 1263) that the marshaling of facts is *not* done by the Board members, but by an anonymous group of opinion writers who prepare the opinion to conform with the decision, and who can, and do, write opinions on either side of a particular proposition with equal facility. Viewed in that light, it is apparent that the "press release" *is* the decision, and since it does not appear clothed with supporting reasons, it is unlawful and violates the Administrative Procedure Act. *If* the Board marshaled *all* the material facts and made informed findings and conclusions on them before reaching, and announcing, its decisions, Eastern would have no complaint.[1] However, it could not be made clearer that this procedure was *not* followed by the Board when these pro-

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[1] Compare Member Hector's dissenting opinion in the Board's Second Supplemental Opinion in the proceedings below (1522a-23a):

> "As I read the Administrative Procedure Act and the Rules of Practice of the Civil Aeronautics Board, I think it is clear that the Members of this Board are bound to review and consider all of the relevant facts and arguments in a case before publicly announcing a decision, whether that announcement be by means of a press release or a formal opinion. • • • Since a majority of the Board, however, has decided to announce the Board's vote in all important cases by means of a press release, I believe that we must be prepared then to assert that prior to such announcement we have each reviewed the relevant factual and legal material, that we have considered all basic issues in oral discussion, and that the opinion-writing process is merely the formalization in writing of findings *already made* by the Board." (Emphasis supplied.)

ceedings were before it and, moreover, is not followed by the Board in any controversy before it.[1]

It is a matter of acute public interest that this Court reaffirm the right of litigants in administrative proceedings to a fair determination of the issues on the record, fairly considered, and not consign their fates to trial by press release.

Eastern asks this Court to rule upon the question: May an administrative agency make up its mind, vote, and publicly announce its determinations without giving supporting reasons and without ever considering material it later finds essential to its formal opinion and order, that is, material evidence not even in existence at the time of the vote, decision and announcement?

IV.

It Is In The Public Interest For This Court To Declare The Bounds Of Proper Conduct And Condemn *Ex Parte* Communications On The Merits Of Adjudicatory Matters Before Administrative Tribunals.

It is eminently in the public interest for this Court to restore public confidence in agency adjudication by unequivocally stating that a party to a contested agency adjudicatory proceeding who resorts to *ex parte* communications outside the scope and purview of recognized procedures, with the intent of influencing agency decisions, cannot profit by its own wrong doing.

The case below presents a flagrant example of unauthorized *ex parte* communication, uncorrected and unexplored by the Court below or the Board.

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[1] See, *e.g.*, *Eastern* v. *CAB*, No. 777 in this Court, where Eastern is requesting this Court to review the Board's "press release" decision practice used in the *St. Louis-Southeast Case*, *supra*.

A. The Problem Is Significant And Increasing.

Government regulation of business activity is one of the most significant factors affecting the national economy today. More, rather than less, Government regulation appears inevitable. Indeed, in almost all distribution and communications media[1] a license granted by the Federal Government is required before a service may be offered.

The Court of Appeals for the District of Columbia has indicated that persons resorting to extra-judicial methods cannot escape careful scrutiny of their over-all fitness for exercise of the responsibility of a Government license, and that their misconduct will weigh against them. See *WKAT* v. *F. C. C.*, 258 F. 2d 418 (D. C. Cir. 1958); *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959). It is in the public interest that this Court affirm the rationale of those decisions so that all may know they cannot profit from improper activities before administrative tribunals.

B. The Court Below Erred in Approving Capital's *Ex Parte* Contacts with the Board and the Decision Conflicts with a Decision in Another Circuit.

The matter of Capital's fitness and ability, and particularly of Capital's equipment availability, was a critical issue before the Board (1043a-45a, 1046a-58a, 1063a-64a, 1460a-62a). The gist of the problem was that Capital had a shortage of modern aircraft at the time of hearing; during the hearing it testified that it would procure British Comet jet aircraft to operate new and existing routes. Subsequently, it abandoned its plans to acquire new aircraft. For that reason, the Board's Bureau of Air Operations withdrew its original recommendation of Capital

[1] Except the press, which is protected by the First Amendment to the Constitution.

for the route it was subsequently awarded, stating that unless Capital could show that it had the equipment to operate the route the Bureau had recommended, the Bureau would have to support another carrier for that route (see, *e.g.*, 1043a-45a, 1063a-64a).

One day before oral argument in the proceeding below an aircraft manufacturer sent to the Chairman of the Civil Aeronautics Board a telegram "at the suggestion of Capital" purporting to show that Capital had accomplished equipment arrangements that would make it possible to operate the routes it proposed (1498a).

The telegram was not served on other parties to the case and its transmission by the manufacturer was not bruited about. Consequently, Eastern and the other parties had no opportunity to rebut the contentions advanced, although Section 7(c) of the Administrative Procedure Act permits every party "to submit rebuttal evidence" and to conduct such cross-examination as may be required for a full and true disclosure of the facts.[1]

Eastern, when it learned, long after the "press release," of the development, requested the Board to consider whether or not Capital had procured the dispatch of the *ex parte* communication and what bearing Capital's action had on its fitness and ability to engage in air transportation (1289a-92a).

The Board's Principles of Practice (section 300.2) prohibit *ex parte* communications between Board members and parties to proceeding before the Board. Eastern contends that the Capital-inspired communication violated the Administrative Procedure Act and the Board's Principles of Practice and denied Eastern a fair hearing. In light of

[1] To the best of Eastern's knowledge, Capital and the sender of the telegram have not as yet actually entered into *any agreement*, although more than two years have elapsed.

WKAT and *Sangamon, supra,* the Court below should have remanded the proceeding to the Board for further hearing on Capital's action.

The Court below excused Capital on two grounds: (1) "the communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case*" namely, an inquiry into passenger fares and into possible change of ownership of Capital (App. B, p. B9); and (2) "there is no indication that Capital made any covert communications to members of the Board", and thus the Court below held *WKAT* inapposite (*Ibid.*).

Eastern submits that the Court misconstrued the law and the facts and should have required hearings. With respect to the idea that the telegram was relevant to other Board functions, Eastern would point out that the Board's investigation of passenger fares was a pending contested proceeding to be decided upon a hearing record. The telegram would be as improper a method of getting any facts of Capital's purported equipment program before the Board for the purposes of that case as it was as a vehicle for approaching the Board in the route case. The purported explanation, advanced by the Board and accepted by the Court below, that the telegram related to the Board's power over control relationships between air carriers and aircraft manufacturers under section 408 of the Act is a sham on its face. Capital itself denied any section 408 implications (1500a).[1] And it later developed that no agreement at all had actually been entered into (1500a). Eastern asked a hearing on its charge that Capital *intended* by unauthorized,

[1] Unfortunately the record below does not contain Capital's letter to the Chairman of the CAB, which is referred to in the Chairman's letter (cited above, 1500a) as denying any §408 problems. The Board has not published Capital's letter.

illegal *ex parte* contact to influence the Board's decision (1289a-92a). The Board and the Court below would sweep the dirt under the rug and *deny* hearing.[1]

The timing of the telegram (one day before oral argument before the Board) gives rise to a strong presumption that the telegram was carefully calculated to influence the Board's decision and was designed for no other purpose. In light of the holdings of *WKAT* v. *FCC, supra,* and *Sangamon* v. *FCC, supra,* such an attempt to influence is improper and requires remand of the proceeding for consideration of the matter.

The Court's statement that "there is no indication that Capital made any covert communications to members of the Board" is simply contrary to the record (and at least is a matter which should have been determined by hearing before the Board and not by the Court below). The agency maxim *qui facit per alium facit per se*[2] condemns Capital. The telegram states on its face that the aircraft manufacturer sent the telegram at Capital's behest (1498a). Capital has nowhere in any of the proceedings below contested the validity of the telegram nor repudiated the manufacturer's authority to act on Capital's behalf. Therefore, the Court below erred in concluding, particularly without hearings, that Capital did not make covert communications to Board members. The facts are that (1) Capital procured the sending of the telegram, (2) the telegram was addressed to the Chairman of the Board, and (3) the telegram was not

[1] It is to be noted that the Department of Justice in another Board case on appeal has called for hearings on similar charges of unlawful conduct by a successful applicant for new route authority. Brief for Department of Justice incorporated into Brief for Respondent, pp. 52-53, *United Air Lines, Inc., et al.* v. *Civil Aeronautics Board, et al.*, Nos. 15414 and 15415 D. C. Cir., 1960.

[2] 1 Bl. Comm. 429.

served upon parties nor was it otherwise made public. Those facts require a finding that Capital did make covert, unlawful communications to the Board. In such circumstances, *WKAT, supra,* requires remand to the Board. It is clear that, if the Court below had understood the facts and had not made its error, it would have applied *WKAT* and remanded the case. This Court is respectfully requested to correct that error.

To the extent there may be degrees of venality attaching to various *ex parte* contacts, Eastern does not suggest that Capital was guilty of the improprieties shown in the *WKAT* case. However, the broad principles of *WKAT* and *Sangamon* show that *all ex parte* communications are improper and must be considered in connection with an applicant's fitness.

Sangamon, supra, recognizes that basic fairness requires that an adversary proceeding be conducted completely in the open. The Court there remanded to the Federal Communications Commission a proceeding where *ex parte* communications to the Commission had been made. Apparently, the basis for the ruling was that the communication violated the Commission's rules and denied other parties the opportunity to question or rebut. Precisely the same situation obtains here—the Capital telegram violated the Board's Principles of Practice and denied opposing parties opportunity to cross-examine and rebut.

Eastern requests this Court similarly to require the Board to hold hearings on Capital's misconduct, as in *WKAT* and *Sangamon.*

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 1960.

APPENDIX A.

Statutes and Regulations Involved.

Fifth Amendment to Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. §1001

Section 3(a):

Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) description of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules

addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(60 Stat. 238, 5 U. S. C. §1002(a))

SECTION 7

HEARINGS

In hearings which section 4 or 5 requires to be conducted pursuant to this section——

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section

8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

(60 Stat. 241, 5 U. S. C. §1006)

SECTION 8(b):

SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the con-

sideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

(60 Stat. 242, 5 U. S. C. §1007(b))

SECTION 10(a):

RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(60 Stat. 243, 5 U. S. C. §1009(a))

SECTION 10(e):

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5)

unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(60 Stat. 243, 5 U. S. C. §1009(e))

Civil Aeronautics Act of 1938, as amended, 52 Stat. 977, 49 U. S. C. §401

SECTION 2:

In the exercise and performance of its powers and duties under this Act, the authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

(52 Stat. 980, 49 U.S.C. §402)

SECTION 401:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

(a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation: *Provided,* That if an air carrier is engaged in such transportation on June 23, 1938, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Board shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by

regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity, otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder.

* * * * * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar

as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Board shall certifiy that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Board shall certify that operations thereunder have ceased: *Provided,* That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Board, or if, for a period of ninety days or such other period as may be designated by the Board, any such service is not operated, the Board may by order, entered after notice and hearing, direct that

such certificate shall thereupon cease to be effective to the extent of such service.

(h) The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

(52 Stat. 987, 49 U. S. C. §481)

SECTION 1005(f):

Form and Service of Orders

Every order of the Authority [Board] shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

(52 Stat. 1023, 49 U.S.C. §645(f))

SECTION 1006(a):

Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President

as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(52 Stat. 1024, 63 Stat. 107, 49 U.S.C. §646(a))

SECTION 1006(f):

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28.

(52 Stat. 1024, 49 U. S. C. §646(f))

CIVIL AERONAUTICS BOARD, RULES OF PRACTICE IN ECONOMIC PROCEEDINGS, RULE 36.

SECTION 302.36 *Final decision of the Board.* Upon submittal of a case to the Board for final decision on the merits the Board will consider the whole record, including the initial or recommended decision of the Examiner or its tentative decision, and the exceptions thereto, will resolve all questions of fact by what it deems to be the greater weight of the evidence thereon, will make its decision, stating the reasons or basis therefor, and enter an appropriate order.

(17 F. R. 3020, Apr. 8, 1952)

Appendix A.

Civil Aeronautics Board, Principles of Practice

Section 300.2 *Hearing cases; improper influence.* It is essential in cases to be determined after notice and hearing and upon a record that the Board's judicial character be recognized and protected. In such cases:

(a) It is improper that there be any private communication on the merits of the case to a member of the Board or its staff or to the examiner in the case by any person, either in private or public life, unless provided for by law.

(b) It is likewise improper that there be any private communication on the merits of the case to a member of the Board or to the examiner in the case by any members of the Board's staff who participate in the hearing as witnesses or as counsel.

(c) It is improper that there be any effort by any person interested in the case to sway the judgment of the Board by attempting to bring pressure or influence to bear upon the members of the Board or its staff, or that such person or any member of the Board's staff, directly or indirectly, give statements to the press or radio, by paid advertisements or otherwise, designed to influence the Board's judgment in the case.

(16 F. R. 2932, Mar. 30, 1951)

APPENDIX B.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 341, 342, 344—October Term, 1958.

(Argued June 3, 1959 Decided October 7, 1959.)

Docket Nos. 25422, 25434, 25532.

EASTERN AIR LINES, INC., CAPITOL AIRWAYS, INC., NATIONAL AIRLINES, INC., CITY OF NASHVILLE and the NASHVILLE CHAMBER OF COMMERCE,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent,

DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., CAPITAL AIRLINES, INC., *et al.*,

Intervenors.

Before:

CLARK,
Chief Judge,

LUMBARD and WATERMAN,
Circuit Judges.

The several petitioners bring their respective petitions seeking review of orders of Civil Aeronautics Board entered in the *Great Lakes-Southeast Service Case* wherein that

Board granted certain applications and denied others, all pursuant to Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, for certificates of public convenience and necessity to perform new air transportation service. The several petitions are each denied. Capitol moved for the appointment of a Commissioner or Referee to determine matters relative to procurement of Congressional testimony. This motion is denied.

WATERMAN, Circuit Judge:

Presented here for our decision are three separate petitions for review of orders of the Civil Aeronautics Board[1] arising out of the "Great Lakes-Southeast Service Case."[2] These orders marked the culmination of an extensive hearing[3] on new route applications for service between points in a specified geographic area of the Middle West on the one hand and Florida on the other. The Board's ultimate decision, insofar as pertinent to this opinion, was as fol-

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[1] The orders are E-13024, the Board's formal opinion in the *Great Lakes-Southeast Service Case*, rendered on September 30, 1958, and E-13211, entitled "Opinion and Order Granting and Denying Stay of Effective Date of Certificates," rendered November 28, 1958. In view of our disposition of the contentions herein we need not decide whether the second order was effective to supplement formal opinion, but see *Frontier Airlines* v. *CAB*, 259 F. 2d 808, 810-811 (D. C. Cir. 1958).

[2] Applications for new route certification are normally decided by the Board in a consolidated "area proceeding." The Board establishes a given geographic area. Thereupon all applications for routes within this area are considered jointly. This Board procedure was approved by the Supreme Court in *CAB* v. *State Airlines*, 338 U. S. 572 (1950).

[3] Some idea of the breadth and complexity of the investigation can be obtained from the following statistics. There were 42 route applications, made by 10 carrier applicants. There were 5 carrier intervenors, 40 civic intervenors, and 42 limited participants. The record consists of 29 volumes totaling 16,000 pages. The evidentiary hearing lasted 8 weeks. The Initial Decision covered 378 pages. The two orders here objected to consist of a modest 88 pages.

lows: Northwest Airlines was awarded a route between Miami and Chicago; the authority of Delta Air Lines was extended so as to permit Miami-Detroit service; and that of Capital Airlines[4] was extended so as to confer upon it authority to render service between Miami and the three cities of Cleveland, Pittsburgh, and Buffalo. Prior to these awards the route between Miami and Chicago was served by both Delta and Eastern Air Lines; Eastern offered the only single-carrier service between Miami and the cities of Detroit, Cleveland and Pittsburgh;[5] and between Miami and Buffalo there was no direct service. Petitioners are as follows: Eastern, which objects to all three awards; Capitol Airways,[6] an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes, which objects to the Board decision as to these routes; and the City of Nashville, Tennessee, which objects to the fact that the Board drew the geographical boundaries of the "area proceeding" in such a manner that service to and from Nashville was excluded from consideration.

Eastern

Eastern's primary contention is that the Board has violated the principle of *Ashbacker Radio Corp.* v. *FCC*, 326 U. S. 327 (1945) in failing to consolidate in this "Great Lakes-Southeast Service Case" an Eastern application for extension of its route authority from Chicago to Minne-

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[4] Capital Airlines is not to be confused with Capitol Airways, a petitioner herein. Capital is a certificated carrier whose routes cover much of the eastern half of the country.

[5] The Board has authorized "interchange" arrangements between Miami and these cities, providing for single-plane service over the routes of two airlines. From the briefs we gather that these arrangements have not been particularly successful.

[6] Capitol is an uncertificated carrier operating under a Board exemption. Its principal business has consisted of performing charter services for the military. For one year, ending July 1955, it conducted scheduled passenger operations within the State of Tennessee.

apolis/St. Paul so that this extension application would be considered along with the proposals by the other carriers for new service between Chicago and Miami. By its consolidation order E-9734, issued November 16, 1955, the Board eliminated from consideration in the proceeding all applications for service to areas north and west of Chicago. Eastern points out that, under the award here objected to, Northwest, which was previously certificated for service between Minneapolis/St. Paul and Chicago, will now be permitted to conduct direct service between Minneapolis/St. Paul and Miami.[7] Eastern further points out that its application for extension from Chicago to Minneapolis/St. Paul, filed eight years before Northwest's application for Chicago-Miami authority and contemplating exactly the same Miami-Minneapolis/St. Paul service as the Board has here awarded Northwest, was not given simultaneous, comparative consideration. Eastern contends that certification of Northwest for Miami-Minneapolis/St. Paul service will as a matter of economic fact preclude cerification of Eastern for that same service. Thus Eastern contends that the Board's procedure has violated the *Ashbacker* principle.[8]

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[7] Pursuant to the Board's consolidation order which denied any successful applicant the right to conduct nonstop flights between "beyond area cities" and points newly authorized in the proceeding, Northwest's flights between Minneapolis/St. Paul and Miami must stop at Chicago. The Board denied Eastern's demand that single-plane flights also be prohibited.

[8] Eastern's *Ashbacker* argument in the *Great Lakes-Southeast Service Case* has been before the courts once previously. Eastern petitioned the Court of Appeals for the District of Columbia to review the Board's consolidation order. The petition was dismissed, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607 (D. C. Cir. 1956), on the theory that a consolidation order was not a "final order" for purposes of judicial review. Having dismissed the petition the court went on to suggest that the *Ashbacker* doctrine was inapplicable to large-scale, multi-application area proceedings. Eastern quite rightly contends that this decision is not *res judicata* in the present case; and, deciding the case as we do, we need not consider the possible inapplicability of *Ashbacker*.

Appendix B.

Ashbacker Radio Corp. v. *FCC, supra,* involved two applications for the construction of radio stations. The stations planned to operate at the same frequency and were located in cities less than fifty miles apart. The Federal Communications Commission found that these two applications as a matter of physical fact were mutually exclusive and thereupon granted one application without hearing and relegated the second to a hearing to be held later. The Supreme Court reversed the Commission, holding, as a matter of statutory construction, that two mutually exclusive applications must be granted a concurrent hearing. Although *Ashbacker* dealt only with physical exclusivity its doctrine soon found its way into aeronautical law, and was applied to applications for the same routes which were mutually exclusive "as a matter of economic fact." *Northwest Airlines* v. *CAB* (D. C. Cir. 1952), 194 F. 2d 339; *Delta Air Lines* v. *CAB* (D. C. Cir. 1955), 228 F. 2d 17. See also *Seaboard & Western Airlines* (D. C. Cir. 1949), 181 F. 2d 777; *Western Air Lines* v. *CAB* (9 Cir. 1950), 184 F. 2d 545.

On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB,* 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none.[9] This failure to make any showing of mutual exclu-

[9] At the hearing before the examiner Eastern requested that the applicants for the Chicago-Miami route be compelled to produce

sivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made.

Second, Eastern points to three instances that it claims are such departures from orderly administrative procedure as to vitiate the Board's action. Eastern's contentions, which will be discussed in turn, relate to (1) a "press release" announcing the Board's tentative decision and released six months before the Board's opinion; (2) participation by assistants of Board members at Board meetings in which tentative awards were made; (3) receipt by the Board immediately prior to oral argument of alleged *ex parte* representations concerning an equipment program commenced by Capital Airlines, the carrier ultimately awarded authority between the cities of Miami and Cleveland, Pittsburgh and Buffalo.

Pursuant to a policy begun at some time more than two years ago, the Board, approximately two months after the completion of oral argument, issued a "press release" announcing the route awards it was granting in the *Great Lakes-Southeast Service Case.* The press release expressly stated that the announcement of the awards did not consti-

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data on the percentage of occupancy on some of the applicants' flights. The request was denied. Before the Board Eastern argued that this "load factor" data was relevant to mutual exclusivity. However, before the examiner Eastern argued only that this evidence was relevant to the ability of these applicants to improve upon Eastern service, or, in the alternative, to the inadequacy of load factor data as evidence in determining the caliber of existing service.

tute decisions in the case but that decisions would be entered and issued later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion.[10] The awards conferred by the Board's formal opinion, however, coincided exactly with those announced in the previous press release. Eastern claims that in effect this practice amounts to a prejudgment, in that the opinion, written six months subsequently, represents nothing more than a rationalization of conclusions previously reached; and that, therefore, the opinion is a nullity even if otherwise legally sufficient. We do not mean to express approval of the Board's practice of making public its tentative decisions. We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshaling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing.

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[10] The Board's explanation of its press release procedure is enlightening. Because of the complexity of the data presented to it in an area proceeding (see footnote 3, *supra*) the Board has found it necessary to make a preliminary, tentative decision, then to draft an opinion based upon it, and thereafter to take a further and perhaps final vote to accept or reject the decision embodied in the proposed opinion. Prior to the adoption of the press release procedure, the Board says that news of the Board's tentative decision seemed invariably to "leak" to interested outside persons. The stated purpose of the press release, therefore, is to make this information uniformly available to the general public and is an admission by the Board that "leaks" do occur and that the Board is powerless to prevent them.

Eastern objects to two of the Board's subsidiary awards[11] for the reason that at the tentative votes on these awards two assistants to Board members participated in place of their respective superiors.[12] However, leaving aside the fact that these votes were merely tentative, we note that the votes in question were cast only after two days of discussion by the Board when all of its members were present, and that the votes later cast by the assistants were cast in compliance with instructions given by their superiors. Accordingly, we find no improper delegation; and, assuming such right to exist, we find no deprivation of an applicant's right to joint deliberation upon his application by the Board members before vote is had upon it.

Eastern contends that the Board must have considered information in its hands relating to an equipment acquisition program announced by Capital three days prior to commencement of oral argument before the Board as bearing upon the issues here, and therefore Eastern was unfairly prejudiced since this information was not part of the record in the case. More specifically, Eastern objects to Capital's wide circulation of a press release relating to the equipment program and, branding this an effort to bring improper pressure upon the Board, Eastern demands that the record be reopened to determine Capital's fitness. In addition, Eastern claims that it was unfairly prejudiced because the manufacturer from whom Capital proposed to purchase its equipment communicated to the Board just prior to the beginning of oral argument the details of the proposed purchase. The Board assures us that the decision

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[11] These were an award to United to serve Columbus and Dayton on Washington-Chicago flights, and one removing from Northwest all restrictions on that carrier's Washington-Pittsburgh-Cleveland-Detroit route. Eastern had applied for each of the routes which these votes awarded to other carriers.

[12] The award to United was by vote of 4–0, one vote being cast by an assistant. The vote with respect to Northwest was 4–0, two votes being cast by assistants.

to award Capital the Miami-Buffalo, Cleveland, Pittsburgh route was uninfluenced by the announcement of Capital's equipment acquisition program. We have no reason to doubt this representation. The communication to the Board by the manufacturer was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case.*[13] See *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727, 730 (D. C. Cir. 1956), *cert. denied,* 352 U. S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC,* 258 F. 2d 418 (D. C. Cir. 1958), is inapposite.

Finally, Eastern contends that, as to the following matters, the Board has failed to make appropriate findings or has failed to support its findings with substantial evidentiary findings: inadequacy of existing service; advantages purported to result from competitive authorizations; sufficiency of various markets to support additional carriers; and insubstantiality of Eastern's loss of revenues resulting from new authorizations.

As to the first two matters, the recent case of *FCC* v. *RCA Communications,* 346 U. S. 86 (1953), is controlling. The Court there indicated that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desir-

[13] Equipment acquisition programs are relevant to a carrier's needs for additional revenue. At the time of the communication to the Board, the Board was conducting a comprehensive investigation of passenger fares. Second, a change in the ownership of Capital, a matter calling for Board approval under Sec. 408 of the Civil Aeronautics Act, 49 U. S. C. A. 488, could possibly result from the financing provisions of the proposed equipment acquisition program.

able when there was sufficient traffic.[14] Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence.[15] See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951); *Colorado Wyoming Gas Co.* v. *FPC*, 324 U. S. 626 (1945).

We have examined Eastern's other contentions and have found them to be without merit.

CAPITOL

As hereinbefore stated, Capitol was an unsuccessful applicant for the Miami-Chicago and Miami-Detroit routes. Capitol's objections to the Board's decision are two: first, the Board failed to make findings concerning Capitol's fitness and the public need for its proposed service; second, the Board erred in allowing additional time at oral argument for statements by Members of Congress, several of whom stated a preference for Northwest, the carrier ultimately selected for the Miami-Chicago route. In connection with the second objection, Capitol has moved that this court appoint a Commissioner or Referee to determine whether

[14] "The Board in the past has recognized the benefits which accrue to the public from stiff multi-carrier competition in major traffic markets in the form of improved quality and quantity of service, increased coach service, utilization of the most modern equipment, etc. We believe that the authorization of a third Chicago-Miami carrier will bring comparable benefits here. We do not find that the services Delta and Eastern have provided are legally inadequate in terms of section 404(a) of the Act. However, we find that the Chicago-Miami market is sufficiently large now and has the inherent potential to support three carriers on an economic basis, and that the public interest will be served by certificating a third carrier." *Great Lakes-Southeast Service Case*, E-13024 [R. 15222].

[15] We note further that Eastern introduced no evidence on the issue of diversion, thus failing to sustain the burden required under *Clarke* v. *United States*, 101 F. Supp. 587, 594 (D. D. C., 1951).

Northwest procured the congressional representations, the motion assuming that Northwest initiative in this respect would constitute exertion of undue influence upon the Board by the carrier.

Capitol contends that Section 401 of the Civil Aeronautics Act, 49 U. S. C. A. 481, requires that the Board, when it is confronted with a series of competitive applications, make findings as to whether each applicant is fit, willing and able to supply the service applied for, and as to whether the service proposed by each applicant is required by the public convenience and necessity. Capitol relies upon Section 401(d)(1) of the Act, 49 U. S. C. A. 481(d)(1) which reads as follows:[16]

> "(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As we read this section it refers only to the findings necessary in order to grant a certificate; it does not purport to deal with situations where the Board has decided *not* to grant the certificate. Courts have previous held that where one of competitive applications is held preferable to the others from the standpoint of public interest, no further findings with respect to the unsuccessful applicants is required. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831;

[16] The parties agree that the applicability of the Civil Aeronautics Act to this case is unaffected by its repeal and replacement by the Federal Aviation Act of 1958, 49 U. S. C. A. 1301 *et seq.*

North American Airlines v. *CAB*, 241 F. 2d 445, 448 (D. C. Cir. 1957). The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence.[17]

We find no merit in Capitol's contention that congressional representations at oral arguments before the Board in favor of Northwest's application constituted undue influence. We so hold irrespective of whether Northwest activily solicited it. Equally without merit is Capitol's contention that the time consumed in listening to Congressional representations denied Capitol equal time with other applicants for oral argument, or that the failure to announce in advance that time would be allotted for congressional statements denied it an opportunity to prepare rebuttal and thereby denied it a fair hearing.

City of Nashville

The City of Nashville, Tennessee contends that the Board erred by excluding from consideration the needs of that city for improved air service. The Board's consolidation order[18] set as the westward limit of the geographic area under consideration a line from Chicago to Indianapolis to Louisville to Atlanta (and ultimately to Miami). Subsequently the westward limit was extended to include Chattanooga, Tennessee and Tallahassee, Florida. Nashville lies to the west of this westward limit as amended, and

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[17] Capitol seems to suggest that *American Airlines* v. *CAB*, 235 F. 2d 845 (D. C. Cir. 1956), cert. denied, 355 U. S. 905, and *Pan American World Airways* v. *CAB*, 261 F. 2d 754 (D. C. Cir. 1958), cert. denied, 359 U. S. 913, have enunciated a more exacting standard for administrative findings of fact. These cases are not applicable here. They merely hold that where the Board permits air operations by exemption under §416(b), 49 U. S. C. A. 496(b), rather than by the more rigorous procedure of certification under §401, 49 U. S. C. A. 481, the Board must give reasons for this shortcut by findings more specific than a mere echoing of statutory language.

[18] Order No. E-9734, issued November 16, 1955.

accordingly its service needs were not considered. We do not find that the geographic limits established by the Board were arbitrary or unreasonable, since we must always have in mind the need to keep the hearing within manageable proportions.[19] We find no error here.

Therefore, insofar as the Board's action is challenged by the petitions of Eastern, Capitol, and the City of Nashville, it is affirmed. Capitol's motion to refer certain matters to a Referee or Commissioner is denied.

Petition for rehearing denied.

J E L
C E C
S R W

Dec. 15, 1959

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[19] See note 3, *supra*.

APPENDIX C.

Opinions and Judgments Below.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 14798

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF NASHVILLE and THE NASHVILLE CHAMBER OF COMMERCE,
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

No. 14804

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
EASTERN AIR LINES, INC.,
INTERVENORS

Appendix C.

No. 14812

EASTERN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE.
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
DELTA AIR LINES, INC.,
INTERVENORS

No. 14822

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE,
CITY OF KANSAS CITY, MISSOURI,
CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,
TRANS WORLD AIRLINES, INC.,
INTERVENORS

On Petitions to Review Orders of the Civil Aeronautics Board

Decided December 10, 1959

Appendix C.

Before PRETTYMAN, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PRETTYMAN, Chief Judge: These are four petitions for review of orders of the Civil Aeronautics Board made in its *St. Louis-Southeast Service Case.* Principally the Board awarded to Trans World Airlines, Inc. (TWA) a new route from St. Louis to Miami and other Florida coast points, and to Delta Air Lines, Inc., a new Memphis-Birmingham route.

The cases in this court fall into two main parts, one relating to each of the above-mentioned awards. The discussion, however, more aptly falls into four divisions: (I) The mutual-exclusivity contentions advanced by American, Delta and National. These carriers claim that TWA was awarded an effective southern transcontinental route without consideration of economically mutually exclusive applications. (II) Impact of the award to TWA on an existing southern transcontinental interchange arrangement. (III) Eastern's contentions concerning mutual exclusivity. Eastern claims that the Board erroneously made awards to TWA and Delta without comparative consideration of its mutually exclusive applications. (IV) The merits of the TWA and Delta awards, apart from mutual-exclusivity arguments, and some miscellaneous contentions.

I

Two proceedings before the Board play parts in this problem. One is the *St. Louis-Southeast Service Case,* which was instituted to inquire into the need for service "between St. Louis on the one hand and Florida and other southeastern points on the other". Several applications were consolidated in that case.[1] As we have noted, the orders here under review were entered in that

[1] Order No. E-10304 (May 18, 1956); Order No. E-10651 (Oct. 2, 1956).

proceeding. The other case which plays a part in the contentions made to us is known as the *Southern Transcontinental Service Case.* It was a combination of several proceedings, which initially had various names. In its order of consolidation in the *Southern Transcontinental Case*[2] the Board delineated the scope of the proceeding to include (1) the need for single-carrier service between Houston and West Coast points, (2) the need for "single-carrier transcontinental service" between Florida points and the West Coast, and (3) the need for single-carrier transcontinental service between Atlanta-Birmingham and the West Coast. In that order the Board repeatedly used the expression "southern transcontinental route". The Board explained that in prescribing the scope of this hearing it intended to consider new or additional through service in the southern tier of states, that is, from Florida across the southern boundary of the country to and including California. The Board said in that connection: "• • • it is necessary to establish a framework in which all major southern transcontinental service issues as a whole can be determined for the foreseeable future." As thus arranged, the case included a large number of applications.

In the *St. Louis Case* various preliminary motions were made by different carriers, which motions fall generally into two classes. The first class was for expansion of the proceeding to include applications for extensions westward of existing routes into St. Louis from the East, so as to add to them routes from St. Louis to the West Coast, and in the opposite direction for extensions eastward of existing routes into St. Louis from the West, so as to add to them routes from St. Louis to the Southeast. These motions were denied. The other class of motions was to impose restrictions upon any grant of a new route from St. Louis to Florida points, so as to prevent any

[2] Order No. E-12861 (Aug. 5, 1958); Order No. E-13132 (Nov. 4, 1958).

grant of such a route from being in effect a through service Florida-California via St. Louis. In response to these motions the Board announced as a minimum restriction a requirement that service on any route granted between California points and Florida points via St. Louis must include a stop at St. Louis. And the Board further announced that the parties would not be foreclosed from advancing in the course of the hearing appropriate evidence which might reflect a necessity for more stringent limitations. Thus the Board limited the hearing in the *St. Louis Case* to service between St. Louis and Florida and other Southeast points.

The Board awarded to TWA the route from St. Louis to Florida points[3] and imposed as the sole limitation the previously described mandatory-stop requirement at St. Louis. TWA was already certificated for through service from St. Louis to California coast points, and the new award was cast in the form of an amendment to TWA's existing Route 2, which was the St. Louis-West Coast route. The effect of the order was to authorize one-plane, one-carrier, through service from Florida coast points to California coast points via St. Louis, with a mandatory stop at St. Louis.

The Board made clear that it selected TWA as the awardee of the new route because this selection would provide for the first time single-carrier, single-plane service between the Florida coast and the California coast. For example, the Board pointed out that TWA's service, "operating nonstop from Los Angeles or San Francisco to St. Louis for expedited carriage to the Southeast onward from St. Louis, will provide a usable and convenient alternative service to the multiple-stop flights operated by the National-Delta American Interchange, and bring important service benefits to a respectable portion of the

[3] Order No. E-13026 (Sept. 30, 1958); Order No. E-13248 (Dec. 8, 1958).

passengers moving in these markets." And in its ruling on a motion for reconsideration the Board said:

> "The TWA award, of course, will permit that carrier to operate a usable one-stop, single-plane service between the West Coast and the points in the Southeast that are being added to its route. It was the carrier's ability to provide these 'beyond area' benefits that was responsible for our selection of TWA as the carrier to perform the *St. Louis-Southeast* services that were found to be required by the public convenience and necessity."

The principal point made by petitioners as to this award is that the Board could not restrict the nature and scope of the *St. Louis Case* to considerations limited to St. Louis-Florida points service, and then in that same case make an award which was for all practical purposes a one-carrier, one-plane, through transcontinental Florida to California route, when there were pending unheard in another proceeding (the *Southern Transcontinental Case*) many applications for transcontinental service Florida to California. This argument is premised upon the fact that the route awarded TWA makes its Florida-California service very slightly longer than would be any route which might be awarded in the *Southern Trancontinental Case.* This method of reaching an award, say the petitioners, is a direct evasion of the *Ashbacker* doctrine.[4]

The law which was established by the Supreme Court in the *Ashbacker* case has been sloganized, given a name, and is often discussed as though it were a technicality. The law which the Court there laid down was far from a technicality. The statute involved (the Communications Act) provided in effect that applicants for licenses should have a right to a hearing before their applications are denied. Two applications which were mutually exclusive were pending. The Court held that the Commission could

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[4] *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U. S. 327 (1945).

not grant one without a hearing of the other. The Court said, *inter alia*:

> "For if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before a denial of their applications becomes an empty thing."[5]

The ruling was a practical conclusion of sound common sense. It is simply a realistic truth that, if only one of several applications can be granted, an award to one applicant is as effective a denial of all the others as would be a flat order of denial.

The foregoing conclusions were premised upon a physical mutual exclusivity of two licenses. It is true, as the Board argues, that the application of the *Ashbacker* doctrine to awards of airplane routes presents many difficulties not in the radio cases. We pointed this out in *Eastern Air Lines* v. *Civil Aeronautics Board*.[6] We now iterate the doctrine there stated; the Board must have a considermeasure of discretion in limiting the areas to be considered in its air-route cases. But at the same time we emphasize that the Board cannot, either intentionally or by the demonstrable effect of an order, avoid what is now known as the *Ashbacker* doctrine.

Another general doctrine, based upon economic considerations, is pertinent to the present case. In many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity.[7] The public

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[5] *Id.* at 330.

[6] 100 U. S. App. D. C. 184, 243 F. 2d 607 (1956), cited and quoted in *Eastern Air Lines* v. *Civil Aeronautics Board*, 101 U. S. App. D. C. 156, 247 F. 2d 562 (1957).

[7] As to air transportation, Sec. 401(d)(1), Civil Aeronautics Act, 52 STAT. 987 (1938). The Federal Aviation Act of 1958, which supersedes the Civil Aeronautics Act, contains the same provision, Sec. 401(d)(1), 72 STAT. 754, 49 U. S. C. A. §1371(d)(1).

interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee. This is a commonplace of public utility regulation. We discussed the principle at length in *Carroll Broadcasting Co.* v. *Federal Communications Comm'n.*[8]

The Civil Aeronautics Act[9] requires notice and hearing on applications for certificates for new routes, and also requires notice and hearing upon petitions for modifications of existing licenses, which latter include extensions of existing routes.[10] Under the Act (Sections 401 (d)(1) and 401(h))[11] a finding of public convenience and necessity is a requirement for either the grant of a new certificate or the extension of an existing route. So the principles we have been discussing apply to air certifications. If the grant of one of several applications for a new route does, as a matter of economic necessity, preclude the grant of any other application, the doctrine of *Ashbacker* clearly applies. Likewise, if the foreseeable traffic would support two carriers and there are, let us

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[8] 103 U. S. App. D. C. 346, 258 F. 2d 440 (1958). The principle is also discussed at length in the dissent in RCA Communications *v.* Federal Communications Comm'n, 91 U. S. App. D. C. 289, 294-296, 201 F. 2d 694, 699-701 (D. C. Cir. 1952), with citations, and is a thread which runs through the opinion of the Supreme Court in that case, Federal Communications Comm'n *v.* RCA Communications, Inc., 346 U. S. 86 (1953). This was a telegraph case, in which the competition involved was economic, not a radio case in which the exclusivity is physical. Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958), prior to *Carroll*, contains a clear intimation to the same effect.

[9] Sec. 401(c), 52 STAT. 987 (1938), as reenacted, 49 U. S. C. A. §1371(c).

[10] Sec. 401(h), 52 STAT. 989 (1938), as reenacted, 49 U. S. C. A. §1371(g). See, *e.g.*, Eastern Air Lines, Inc., et al., Great Lakes to Florida Service, 6 C. A. B. 429 (1945); Delta Air Corp., et al., Service to Atlanta and Birmingham, 2 C. A. B. 447 (1941).

[11] *Supra* notes 7 and 10.

say, five applicants, the grant of any one is an effective denial of three of the remaining four applications, and *Ashbacker* applies.

The Board denies the applicability of *Ashbacker* in this latter situation and refers us to *Pauley* v. *Federal Communications Comm'n.*[12] However that case involved neither a grant nor a denial of an application and thus is not remotely pertinent to the situation now before us.

The doctrine of *Ashbacker* also applies where a request for an extension of an existing route would preclude the grant of other pending applications for the entire route. If one certificate for a route exists, and if the grant of a second competitive route would as a matter of economic fact destroy or substantially reduce the rendition of the service required by the public interest, the public interest precludes the competitive grant. The Board has frequently recognized and applied this latter rule; as a matter of fact it almost always does so.[13]

This bring us to a consideration of the practicalities of the situation in the case before us. The characteristics of a restricted-area service are entirely different from those of a transcontinental service. This is well recognized in the industry. We think the Board cannot be compelled to expand an area case: but at the same time it cannot be permitted to transform the nature of an area case without applying to it the factors which govern the case as trans-

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[12] 86 U. S. App. D. C. 294, 181 F. 2d 292 (D. C. Cir. 1950).

[13] See, *e.g.*, Southern Transcontinental Service Case and Dallas to the West Service Case, C. A. B. Order No. E-12861 (Aug. 5, 1958); Investigation of Service to Winston-Salem and/or Greensboro-High Point, C. A. B. Order No. E-12873 (Aug. 8, 1958), 1A Av. L. Rep. par 22,192; Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953); Transcontinental & Western Air, Inc., et al., Detroit-Memphis Service, 6 C. A. B. 117 (1944). *Cf.* Seven States Area Investigation, C. A. B. Order No. E-13254 (Dec. 8, 1958), 1A Av. L. Rep. par. 22,226, 22,226.11 (new competitive service would be too costly to the Government in subsidies).

formed. It cannot hear an area case and, without more, make a transcontinental award. It cannot thus ignore pending applications for a transcontinental route certificate, if those applications are mutually exclusive with the award being made. Petitioners, or some of them, had pending applications for through routes Florida to California coast. These were consolidated in the *Southern Transcontinental Case.* They endeavored by motions in the *St. Louis Case* to persuade the Board to do one of two things, either restrict any award in that case so stringently as to preclude its being effective through southern transcontinental or give comparative hearing to all pending applications for such a route. They now argue to us that the maximum power of the Board under the statute, construed according to *Ashbacker,* was limited to these two alternatives. The Board apparently agrees with the general principles underlying these arguments; references to them appear in the orders of consolidation.

So the first debated question in whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.

In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.

Appendix C.

In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National.[14] A year later the Board, without further hearings, authorized a competitive interchange service.[15] This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing.[16] The board then found that the proposed new service would be hopelessly uneconomic and denied the certificate.[17] One finding of the Board was that:

> "• • • the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami."[18]

The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions.[19] Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services.

All the applications consolidated in the *Southern Transcontinental Case* seem to have included the possibility of one or more stops. Nowhere is it made to appear that

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[14] Southern Service to the West Case, 12 C. A. B. 518.

[15] Southern Service to the West Case, 14 C. A. B. 310 (1951); Southern Service to the West Case, 15 C. A. B. 94 (1952).

[16] Southern Service to the West Case, 15 C. A. B. 124.

[17] Southern Service to the West Case, Reopened, 18 C. A. B. 234 (1953).

[18] *Id.* at 236.

[19] Southern Service to the West Case, Reopened, 18 C. A. B. 790 (1954).

any such applicant sought only a nonstop certificate, to which service the TWA one-stop service might not be potentially competitive. The comparative circuity of the St. Louis route over the proposed through routes would appear to be no greater than over the existing interchange. If the TWA one-stop service is an effective competitor to the existing interchange to the extent of a 50 per cent diversion of the latter's business (assumed by the Board *arguendo*), it seems to us the TWA service must, *prima facie,* be viewed as a potential competitor to some similar extent of any awardee of a transcontinental route Florida coast to California coast involving one or more stops. And, if the Florida-California business via interchange is enough to support service on only one route, the same business available via one carrier, but with a stop, would appear *prima facie* to be not too much greater. If these things be so, an analysis and evaluation of the available business is necessary, if demanded. To state the matter in other terms, if mutual economic exclusivity is claimed and the claim has a reasonable *prima facie* basis, hearing on the question is required.

The Board submits several answers to the foregoing. In the first place the Board says that the motions for consolidation in the *St. Louis Case* filed by some of the applicants for single-plane, single-carrier service from Florida to California were filed too late. Rule 12(b) of the Board's Rules[20] requires that motions to consolidate must be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. In the circumstances of the present case this is an unrealistic suggestion. Some of these applicants made efforts to have the Board expand the *St. Louis Case* so as to include transcontinental considerations. This the Board refused to do. The Board strictly limited that case to issues relating to St. Louis-Southeastern points service. With the issues

[20] 14 CFR 302.12(b).

thus restricted, counsel for these applicants properly restricted their participation to the presentation of evidence which was relevant to those issues. As a matter of fact the Administrative Procedure Act[21] requires the exclusion of irrelevant evidence. Indeed, as the Board seems to recognize in a footnote (5) to its opinion on reconsideration, the posing of the issue as to restrictions was an indication that the Board would prevent any award in the case from being a transcontinental route—quite the contrary to any indication that transcontinental service was to be the subject of the hearing.

In the second place the Board says that all of these applicants were in fact participants in the *St. Louis Case* and, as such, had an opportunity to present whatever evidence they desired to present. But this suggestion is also unrealistic under the view which we have described as applicable to the timeliness point. The Board says that these applicants were well aware of the implications of the TWA application. They obviously were initially so aware, as is evidenced by their various motions and informal requests at the beginning of the case; but, as we have pointed out, the Board severly restricted the issues to be adjudicated and as to which these parties (as applicants or as intervenors) were permitted to participate.

In the third place the Board says it made findings to the effect that there is no mutual exclusivity between the TWA award and the possible grant or grants of the applications now consolidated in the *Southern Transcontinental Case*. The Board points to certain passages in its two opinions as being findings that there was no mutual exclusivity. It cites to us such passages as that the TWA route "would not in any real sense preclude a finding of public need for a more direct routing," and that the

[21] Sec. 7(c), 60 STAT. 241 (1946), 5 U. S. C. A. §1006(c).

award would not "warrant the assumption that TWA will thereby obtain preferential status in deciding the issues in that case." The Board recited that there is no mutual exclusivity, but the quotations hardly qualify as "findings". They are not based on evidence, and they are not consequent to a hearing on the issue of exclusivity.

The question presently before us is not whether the Board might on some evidence before it conclude that there was no mutual exclusivity; the question is whether the applicants are entitled to a hearing on the issue. Their statutory right is to a hearing before denial of their applications; provided, of course, that the allegations, of fact are sufficient to raise a debatable question. The right to a hearing is the sole question before us.

On this part of the case we hold: (1) The Board had ample authority to limit the *St. Louis-Southeast Case* to considerations pertaining to that area. (2) After the Board had restricted the case to area considerations and had proceeded to the end on that basis, it could not, in that same case, make a transcontinental award. (3) A *prima facie* indication of economic mutual exclusivity between the applications consolidated in the *Southern Transcontinental Case* and the route awarded in the *St. Louis Case* to TWA appears in this record. The case must therefore be remanded.

We do not intimate to the Board what steps it should take upon this remand. Our holding does not necessitate a full evidentiary comparative hearing on all applications for a southern transcontinental route. The Board might, among a number of alternative courses, (1) hold a hearing upon the exclusivity question alone or (2) impose such a restriction upon the route award to TWA via St. Louis as to insure that it would not be an effective competitor with any single-plane, single-carrier transcontinental route which might result from the *Southern Transcontinental Case.*

II

As we have indicated, a three-carrier interchange authorizing Florida-California service via New Orleans and Dallas had been licensed in 1951. American argues that the award of a competitive transcontinental service Florida to the West Coast would be a modification of the existing interchange license to which it is a party. We held to the contrary in the *Gerico* case,[22] there concluding that economic damage to an existing licensee is not a modification of the existing license, absent agency rules guaranteeing protection from economic injury.

Petitioners American and Delta also argue that the foreseeable impact of a possible award in the *St. Louis Case* was clearly such as to raise an issue of the public interest in a duplication of services. We have said enough under I, *supra*, to show we agree with that argument. The question required solution by evidence and findings, if a transcontinental award was to be made.

The Board recited its conclusion that the award to TWA was required by the public interest and necessity. But that conclusion was related to a St. Louis-Southeastern-points route. It is entirely true that in making such a finding in a limited-area case the facts of the air transportation system compel consideration of out-of-area factors. We pointed this out in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*.[23] But that is not our present problem. The problem is the public interest in a competing southern transcontinental service.

The Board makes much of the point that the foreseeable diversion of traffic from the interchange partners is not material to them in the light of their overall resources. The point is immaterial on the question whether these carriers are entitled to a hearing on the possible existence of mutual exclusivity.

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[22] Gerico Investment Co. *v.* Federal Communications Comm'n, 103 U. S. App. D. C. 141, 255 F. 2d 893 (1958).

[23] 104 U. S. App. D. C. 78, 259 F. 2d 808 (1958).

III

We come now to Eastern's contentions respecting its application for an extension of its Route 10 westward from St. Louis to the West Coast and its application for an extension from Memphis to Kansas City. The former controversy concerns the award to TWA and the latter the award to Delta.

Eastern's motion in the St. Louis Case for consolidation of its pending application for a westward extension of Route 10 was denied. Eastern contends that without comparative consideration of its (Eastern's) application the award to TWA of a transcontinental service virtually identical to that proposed by Eastern violated the latter's rights under *Ashbacker*.

Eastern's application for a westward extension of Route 10 must be considered from two points of view. It must be considered from the point of view of the case as a St. Louis-Southeastern-area case, which is what the Board declared it to be. Then it must be considered from the point of view of a through southern transcontinental route, which is what our petitioners say the Board considered in fact.

Eastern has a network of certificated routes spread over the eastern half of the country, with westernmost termini at Chicago, St. Louis, Memphis and San Antonio. An extension from St. Louis to the West Coast would in actual practical fact create for Eastern a Boston-New York-West Coast route via St. Louis, as well as a Florida-West Coast route. The traffic accumulated by the Boston-St. Louis network is part of the "back-up traffic" which the Board says would be fed by Eastern into its new segment St. Louis-West Coast. That the traffic thus picked up in the Northeast would be greater than that originating in the Southeast seems obvious.

Quite clearly the route sought by Eastern from St. Louis westward was not within the area of the case. Also

quite clearly its route Boston-New York-West Coast via St. Louis would not have been a southern transcontinental route. So, if that were all that is involved, no problem would be presented. But, as we have noted, Eastern's requested extension would also connect at St. Louis with its existing St. Louis-Florida-coast route.

We first consider Eastern's application as a part of the *St. Louis Case* as a true area case. Eastern's extension west and TWA's extension east presented different problems in respect to traffic and the area. TWA's extension was physically within the area, and the out-of-area traffic which was involved would flow from existing routes into and through the area over the new segment. This traffic is certainly pertinent to the selection of a carrier to perform intra-area services found necessary because of service deficiencies within the area; such traffic may well, as the Board found, be used to provide the base for proper traffic development within the area.

The basic consideration in an area case is, of course, the public interest in and necessity for service in the area. It seems to us that the need of the area for service to traffic coming in from the outside and also the need of the area for service from inside the area to the outside are both proper considerations in an area case. And so the Board can properly take such needs into consideration. But we think the needs of outside traffic, considered as such, are not necessarily pertinent to an area case. Thus, to illustrate, if traffic originating in Seattle wanted very badly to go to Miami, such need, if not linked with some need inside the southeast area, would not be relevant to a southeast area case. The Board could restrict the area case by excluding such wholly outside data.

Eastern's new segment would have been outside the area, and the traffic picked up by it would have been newly picked up for transportation into the area over an existing service in the area. In other words, this application posed the problem of creating in an area service case a new route

outside the area for the purpose, or with the effect, of bringing traffic into the area under consideration. We think the Board cannot be compelled to expand an area case in that way. We think this situation falls within the power of judgment vested in the Board to limit these area cases. We find no error which would require or justify our interference in the Board's decision as a limitation upon a true area case.

We now look at this application of Eastern as part of a southern transcontinental consideration, which, as we have pointed out, is what the Board appears to have undertaken and decided in part in this proceeding. Eastern's existing certificate for Route 10 apparently authorized through service St. Louis-Florida coast points. The record shows, as the Board recites in its Order No. E-13026, that Eastern actually began the operation of such a through service St. Louis-Miami nonstop. So Eastern's application for an extension westward from St. Louis would have given it a Florida-West Coast route with one stop at St. Louis. The eastward extension awarded TWA was St. Louis-Miami via intermediate points Nashville, Atlanta, Tampa and St. Petersburg. So TWA under the award could duplicate Eastern's existing St. Louis-Florida service, either with the stops indicated or nonstop, and the transcontinental route created for TWA by the award is a duplicate of the transcontinental route which would have been created for Eastern by a grant of its application.

Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants for transcontinental certificates, discussed by us in I, *supra.*

The one factor possibly differentiating Eastern's transcontinental application from those of the other applicants in this case is that Eastern's proposed St. Louis-West Coast route would not be merely a southern transcontinental route but would connect to the West Coast all of Eastern's network of routes in the East. It was on this basis, and on a

consideration of the potential traffic between St. Louis and points west thereof named in the application, that the Board reached its conclusion of no mutual exclusivity. The direct question as to exclusivity is whether TWA's St. Louis-Florida segment will prevent a grant of Eastern's St. Louis-West Coast segment. These are not two segments over the same route but come into competition one with the other when they are linked up with the respective existing networks. Thus the whole of both carriers' systems seem to be involved. The Board mentioned as a decisive factor the whole of Eastern's potential traffic, given the new award. It did not mention the comparative whole of TWA's potential traffic, given the new award. The Board's reasoning and the bases for its conclusion on this point are by no means clear. It refers to the substantial "back-up" traffic available to Eastern from its entire eastern network and to "these varied traffic sources". This could mean (1) that the Board did consider the whole of the traffic potentialities of both carriers, or (2) that the Board deemed the traffic potential of the single St. Louis-Southeast route awarded TWA as *de minimis* in comparison with the whole of the traffic potentially available to Eastern from the entire southeastern area and the Northeast, or (3) some other meaning not readily discernible. So we are unable to determine whether the Board's action was or was not valid. Upon the remand the Board will make a clearer definition of its conclusion upon this point and the reasons therefor.

The Board contends that Eastern did not avail itself of the opportunity presented to it to offer evidence in support of its claim of exclusivity. The record shows, however, that Eastern, in its petition for reconsideration of the Board Order No. E-13026, did refer to some facts on which it relied to show mutual exclusivity. The Board's reply, with its reference only to traffic available to Eastern, was inadequate. Therefore, despite Eastern's awareness that the issue of mutual exclusivity was open to it during all stages of the hearing, the Board's failure to make the

necessary specific findings deprived Eastern of the full hearing required by *Delta Air Lines* v. *Civil Aeronautics Board.*[24]

In sum, as to Eastern and TWA: If the Board proceeds with the *St. Louis Case* so restricted as to constitute it a true St. Louis-Southeastern points area case, it need not consolidate Eastern's application for the westward extension. But, if it proceeds with the case as in practical effect a transcontinental route case, it must make adequate findings upon the problem of exclusivity, which may or may not involve a further hearing.

The situation of Eastern *vis-a-vis* Delta is that Delta applied for and was awarded a new segment Memphis-Birmingham, which was within the St. Louis-Southeastern area and constituted a link in a St. Louis-Florida coast service, whereas Eastern applied for and was denied a new segment Memphis-Kansas City, the latter point being well outside the area of the case and this segment being no part of a St. Louis-Southeastern service. The question is whether Eastern's Memphis-Kansas City application was required to be consolidated for comparative hearing with Delta's Memphis-Birmingham application.

Delta already has certificated routes in the St. Louis-Southeastern area. These include routes from St. Louis to Memphis and from Memphis roundabout to Jackson-Meridian-Birmingham-Atlanta and thence to Miami. It also has a route Kansas City-Memphis. Eastern, as we have noted, already has certificated routes in the St. Louis-Southeastern area, among them one Memphis-Birmingham-Atlanta and thence to Miami. Eastern urges that the grant to Delta of the Memphis-Birmingham segment creates for Delta a through service Kansas City-

[24] 97 U. S. App. D. C. 46, 228 F. 2d 17 (1955). It is true that, unlike the instant case, the *Delta* case did not involve an application for a new route segment outside the limited area under consideration. However, the reasoning of that opinion requires the same kind of hearing in a case such as this, where a *prima facie* showing is made of mutual exclusivity of applications for a particular route.

Florida coast, and that its (Eastern's) application for a segment Kansas City-Memphis would have created for it, *inter alia*, precisely the same through service Kansas City-Florida points. The Board says (1) that consideration of this Eastern application would be an unwarranted expansion of the area case, and further (2) that the mandatory stops required by it to be made by Delta on any single-plane flights Kansas City-Florida points are sufficient to prevent the award from creating a service which would in any degree preclude an eventual grant to Eastern of the Kansas City-Memphis extension, with authority to overfly Memphis.

Eastern's position is, in effect, that the same considerations which apply to the treatment of the transcontinental route problem, as it arose in the *St. Louis Case*, apply likewise to the Kansas City service problem as it arose in that same case. We think they do not. The expansion of an area case by adding a little additional segment outside the area is quite a different thing from awarding a transcontinental certificate in a limited area case. The former is an expansion of a limited case. The latter is a transformation of the real nature of the proceedings. We are of opinion that the Board had a discretion to refuse to include in the St. Louis-Southeastern area case Eastern's application for the Memphis-Kansas City segment.

Eastern complains that, although the Delta award would not be mutually exclusive with one part of its application, it would preclude the award to Eastern of another part of its application, namely, the identical route, with the same mandatory stops, as that obtained by Delta. Eastern complains that the Board made no finding on this point. This Kansas City-Memphis-Birmingham-Atlanta-Florida route would be one of many combinations of routes available to Eastern from Kansas City to Southeast points. But to consider this one route separately would be to require the dissection of an area case into a number of competing segments and to require comparative consideration of each

pair of parts of applications. We think there is no such requirement. Moreover in this contention Eastern splits its unrestricted application into small sections and urges that the several sections must be compared with similarly segregated sections of other applications. We think the Board is not required to do this. Were the law otherwise, the Board would be burdened with a flood of applications and motions, with consequent hearings thereon, filed by airlines whenever a new route was proposed which served any point already served by the protesting line. Such a tangle would prevent the Board from performing its statutory duty of upholding the public interest by fostering a sound air transportation system.

IV

Eastern contends that the TWA and Delta awards were not made upon proper findings of public convenience and necessity based on substantial evidence; that the record requires a finding that Eastern could and would satisfy all service needs in the St. Louis-Southeast market; that the Board failed to make sufficient findings on the cumulative diversion of revenue from Eastern because of awards made in this and other cases; that the Board failed to make adequate findings of the market potential; and that TWA was awarded an Atlanta-Florida service without any finding of need for such service. We have examined the record and find these contentions to be without merit. While it is true that there is some evidence to support Eastern's position on certain of these issues, there is substantial evidence to uphold the challenged findings of the Board. Eastern's basic arguments concerning the lack of need for the creation of new service competitive to Eastern in the St. Louis-Southeast market are intimately tied to its contention that the Board erroneously failed to reopen the record to receive new evidence of Eastern's operations after the commencement of the

hearings. These several contentions of Eastern must be viewed against the background of findings by the examiner and the Board, upon extended evidence, that Eastern's service in the Southeast area had been inadequate, that Eastern had not developed the potential market, that more traffic would result from improved service, and that there was a public need for competition in the area. Upon the facts of this case, we think the Board did not abuse its discretion in declining to reopen the record.

It is true that the Board did not find any need for the Atlanta-Florida service award to TWA, considered as local service. But it specifically found a need for trunk-line service from St. Louis-Nashville to both Atlanta and Florida. We find no error in the Board's award of the route without an absolute restriction against local service between Atlanta and Florida.[25] The Board did place a long-haul restriction on the Atlanta-Florida segment award to TWA.

Delta, while agreeing with the Board's findings on the need for a new competitive St. Louis-Southeast route, contends that the Board erred in that it awarded the new route to TWA on the basis of a "need" not in issue and failed to make certain comparative findings as to Delta's and TWA's qualifications for the route. Delta attempts to demonstrate that the Board, without so saying, actually picked TWA as the awardee upon a consideration of needs of out-of-area traffic. It says the Board specifically excluded from the issues in the case the service needs of out-of-area traffic, *i.e.*, the needs of cities west and north of St. Louis for service into the Southeast area. Nevertheless, says Delta, the Board based the award to TWA upon such needs. But it clearly appears that the only use the Board made of out-of-area traffic data was as one of the factors in selecting the carrier best able to meet the needs of the area. The Board said:

---

[25] It should be noted that Eastern made no request for any such restriction.

> "Aside from seasonal factors, the end-on-integration of the extension from St. Louis to the Southeast with that portion of route No. 2 extending west of St. Louis will permit TWA to combine the traffic flow to and from cities east and west of St. Louis, *so as to support maximum frequencies in the St. Louis-Southeast markets and better develop the traffic potential in this area.*" (Emphasis added.)

This course was approved by us in *Frontier Airlines, Inc.* v. *Civil Aeronautics Board, supra* and discussed herein in relation to Eastern's claim. The use of out-of-area traffic data for these purposes has no reliance to the point discussed by us in Part I, *supra*, which was the right of competing applications to a hearing when a transcontinental route is being awarded. We find no reversible error in the Board's selection of TWA as the awardee, if the Board is to make an area award only.

We have examined Delta's remaining contention, that the Board failed to make adequate comparative findings on certain points and find nothing that requires us to disturb the Board's disposition. It is clear that the Board in its original opinion discussed Delta's qualifications in comparison to those of TWA. Various other errors allegedly committed by the Board are urged upon us. We have examined these contentions and find no reversible error.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Before:

PRETTYMAN, Chief Judge, BAZELON and FAHY Circuit Judges, in Chambers.

Appendix C.

Order.

Upon consideration of the motion of Delta Air Lines, Inc., to conform judgment of this court to the opinion, it is

ORDERED that the judgment of this court in these cases is amended to read as follows:

> "These cases came on to be heard on the record from the Civil Aeronautics Board and were argued by counsel.
>
> "On consideration whereof, it is ORDERED and adjudged by this court that the orders of the Civil Aeronautics Board on review in these cases are affirmed with respect to the award to Delta Air Lines, Inc., and are reversed with respect to the award to Trans World Airlines, Inc., and that with respect to the award to Trans World Airlines, Inc., these cases are remanded to the Civil Aeronautics Board for further proceedings not inconsistent with the opinion of this court."

It is FURTHER ORDERED by the court, sua sponte, that the last paragraph of the opinion of this court is amended to read as follows:

> *"Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion."*

Dated: January 7 1960

Per Curiam.

MOTION FILED APR 11 1960

IN THE

Supreme Court of the United States

Nos. 785, 786.

EASTERN AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

CAPITOL AIRWAYS, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO BE NAMED A PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION AND BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION.

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IN THE

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Nos. 785, 786.

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Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

CAPITOL AIRWAYS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION TO BE NAMED A PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION.

Northwest Airlines, Inc. (Northwest), the principal intervenor-respondent in the above entitled cases in the United States Court of Appeals for the Second Circuit, respectfully moves (a) to be named a party respondent to the petitions for certiorari to the United States Court of Appeals for the Second Circuit brought by Eastern Air Lines, Inc. (Eastern) and Capitol Airways, Inc. (Capitol); and (b) for leave to file the annexed brief in opposition to the petitions of Eastern and Capitol for writs of certiorari

Motion to Be Named a Party Respondent and for Leave to File Brief in Opposition

to the United States Court of Appeals for the Second Circuit.

Although it is common practice in proceedings to review actions of administrative agencies to name as respondents the parties in interest before the administrative agency as well as the agency, in the above-entitled cases only the administrative agency involved has been named a respondent. Northwest was permitted to intervene in the Court of Appeals and participated fully in the proceedings of that Court as it had before the Civil Aeronautics Board.

Northwest is the recipient of the principal route award granted in the proceedings before the Civil Aeronautics Board which petitioners seek to have reviewed, and has a vital concern in the disposition of these petitions. Northwest has been operating on that route for more than one year and has incurred substantial expenses and made substantial commitments in connection therewith.

The interest of Northwest in these proceedings is apparent. It therefore asks that it be permitted to participate fully in these proceedings as a party respondent.

Respectfully submitted,

C. Frank Reavis,
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26 Broadway,
New York 4, New York.

IN THE

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Nos. 785, 786.

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Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR NORTHWEST AIRLINES, INC. IN OPPOSITION.

Opinions Below.

The orders and opinions of the Civil Aeronautics Board in the "Great Lakes-Southeast Service Case" reviewed by the Court of Appeals below have not as yet been published in the bound Reports of the Civil Aeronautics Board. They appear in the printed Joint Appendix used in the Court of Appeals (1313a-1400a, 1469a-1497a, 1509a-1536a).

The opinion of the Court of Appeals affirming the Board's orders is reported at 271 F. 2d 752 (2d Cir. 1959).

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition of Eastern Air Lines, Inc. (Eastern) and the petition of Capitol Airways, Inc. (Capitol).

Statutes and Regulation Involved.

Involved in this case are Sections 2, 401(c) and (d), 1005(f) and 1006(a) and (e), of the Civil Aeronautics Act of 1938, as amended (52 Stat. 980, 987, 988, 1023, 49 U. S. C. §§402, 481(c) and (d), 645(f), 646(a) and (e)), and Sections 3(a), 7(c), 7(d), 8(b), 10(a), and 10(e) of the Administrative Procedure Act (60 Stat. 237, 241, 242, 243, 5 U. S. C. §§1002(a), 1006(c), 1006(d), 1007(b), 1009(a) and 1009(e)). The regulation involved is Rule 14 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings, 14 C. F. R. §302.14. All of the foregoing are printed in Appendix A hereto.

Questions Presented.

1. Is an *Ashbacker* question presented where the objecting carrier received substantially the route it had requested in a separate but concurrent route proceeding?

2. Is an *Ashbacker* question presented where there is no evidence in the record of mutual exclusivity and where the objecting carrier has not attempted to introduce evi-

dence of mutual exclusivity although offered full opportunity to do so?

3. May the Civil Aeronautics Board issue a press release announcing its tentative vote prior to issuance of its final order and opinion?

4. May members of Congress appear at public oral argument before the Board pursuant to statute and the rules of the Board?

Summary of Argument.

As grounds for granting the writ, petitioners assert that the questions presented by the instant case are important ones and petitioner Eastern also asserts that the decision below with respect to the application of this Court's decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. 327 (1945), is in conflict with a decision of the Court of Appeals for the District of Columbia Circuit.

The importance of the questions presented rests merely on petitioners' conception of the merits of the case. The questions presented were decided in a manner fully compatible with the prior decisions of this Court. Similarly, Eastern's assertion of conflict with the Court of Appeals for the District of Columbia Circuit is not borne out by a comparison of the facts of the two cases or of the opinions of the two courts.

This case was a so-called area proceeding dealing with air service among points within a geographical area, specified by the Board, bounded by Chicago, Detroit and Buffalo on the north and Miami and Tampa on the south. A review of the procedural steps which resulted in the delineation of

the area demonstrates a course of conduct by Eastern, the purpose of which was to prevent the Board from placing a third carrier on the Miami-Chicago route. The lack of validity of those procedural maneuvers is illuminated by the absence of effort by Eastern to present evidence to support or lay the basis for *Ashbacker* claims made by it during the proceeding although offered full and ample opportunity to do so.

Eastern's assertion that the questions it presents are of such importance as to justify their consideration by the Supreme Court wholly ignores the fact that the decision of the Court below rests on absence of factual foundation for Eastern's claims rather than the presence of a fundamental legal issue. It is no denial of due process to insist that a sophisticated litigant lay a minimal basis for its asserted claims rather than toy with administrative agencies and the Courts.

Moreover, it wholly ignores the fact that Eastern has already obtained in another proceeding substantially what it claims it was denied in this proceeding, thus rendering moot Eastern's claim of prejudice. In that proceeding Eastern obtained full comparative consideration along with Northwest of the right to operate non-stop between the Twin Cities (Minneapolis/St. Paul) and Miami, and in fact received the right to operate between the Twin Cities and Miami either via Chicago and another city or via Cincinnati. The latter one-stop route is approximately the same mileage as the one-stop route resulting from the connection of Northwest's pre-existing Twin-Cities Chicago route with the Chicago-Miami route awarded it in the *Great Lakes Case*, to which Eastern here objects.

The history of the instant proceeding demonstrates, we believe, that Eastern's concern is wholly with added com-

petition on the Chicago-Miami route—not with any claimed prejudice of rights to a fair hearing with respect to a Twin Cities-Miami route.

Statement of Facts.

This matter originated as an airline route proceeding before the Civil Aeronautics Board, known as the "Great Lakes-Southeast Service Case" (CAB Docket 2396, *et al.*).

The order issued by the Board in that case granted to various carriers, including Northwest and petitioner Eastern, route extensions by amendments of their respective certificates of public convenience and necessity issued by the Board. The order also denied applications, or portions of applications, of various air carriers, including Northwest, Eastern, and petitioner Capitol.

One of the routes involved in the *Great Lakes-Southeast Service Case* is the route between Chicago and Miami. Prior to the proceeding before the Civil Aeronautics Board, this route had been the exclusive province of petitioner Eastern and Delta. The Board's decision in this case opened the Chicago-Miami market to a third carrier, Northwest.*

The proceeding began on May 25, 1955. On that day the Board issued a notice that a pre-hearing conference would be held before the hearing examiner on an application by Eastern for new route authority, Docket 2396 (R. 1), extending Eastern's routes from Washington and Charles-

* The other major routes involved in the *Great Lakes* case were one connecting Detroit with Miami, on which Delta was certificated to compete with Eastern, and one connecting Cleveland and Pittsburgh with Miami, on which Capital Airlines was certificated to compete with Eastern. Capital was also certificated to provide a new service between Buffalo and Florida.

ton, South Carolina, to Chicago and Detroit via various intermediate points.

In accordance with its usual procedure, the Board determined that it would consolidate for hearing all pending applications within a geographical area to be defined. It gave an opportunity to interested persons to be heard on the question of what scope the proceeding should take. The procedural discretion of the Board to consolidate and hear route applications in a so-called "area proceeding" was upheld by this Court in *Civil Aeronautics Board* v. *State Airlines,* 338 U. S. 572, 576-7 (1950).

From the outset, Eastern took the position that the proceeding would have to be limited strictly to the narrow area encompassed by its original application or else that a consolidated area proceeding would have to embrace Eastern's route applications covering almost the entire United States (R. 786-797). Those applications included extensions of Eastern routes

(a) from Louisville to Detroit and Buffalo;

(b) from Birmingham to New Orleans, Houston and San Antonio;

(c) from Miami to Detroit and Minneapolis/St. Paul;

(d) from Miami to Pittsburgh and Buffalo;

(e) from Chicago to New York;

(f) from New Orleans and Houston to Chicago and Detroit;

(g) from Chicago to Milwaukee, Des Moines, Cleveland, Cheyenne, Salt Lake City, Boise, Spokane, Portland and Seattle;

(h) from Chicago to Denver, Las Vegas, Los Angeles, San Diego, San Francisco, Oakland, Sacramento, Reno, Medford and Salt Lake City; and

(i) from its Miami-Tampa-Pittsburgh-Cleveland-Detroit segment to Chicago, Milwaukee, Madison, Rochester, Minneapolis/St. Paul, Billings, Spokane, Portland and Seattle.

Eastern's basis for its position was that other carriers serving certain of the above points had applications pending for authority to operate routes south and east of Chicago and that if those applications were consolidated into the proceeding, the Board was required to consolidate the far-ranging Eastern applications.

The Consolidation Order.

In its consolidation orders (R. 933-944, 1048-1053), the Board limited the scope of the proceeding to service in a generally triangular area bounded by Chicago, Detroit and Buffalo on the north, and Miami and Tampa on the south,* and rejected Eastern's request that the proceeding be expanded to include its applications for services, as the Board put it, "from the Atlantic to the Pacific via nearly every major traffic point" (R. 1052).

Eastern then amended its original application (for the fourth time) to apply for

> "any new air transportation authority sought by any other applicant pursuant to any application which may be consolidated with this application for hearing and decision whether or not that new air

* In the last consolidated area proceeding involving Great Lakes-Florida routes, decided some ten years previously, the area selected by the Board was bounded on the north and west by Chicago and Detroit, the same terminal points selected by the Board in this proceeding. *Great Lakes-Florida Service Case*, 6 C. A. B. 429 (1945).

> transportation authority is sought by a new route proposal or through a combination of a new route proposal with an existing route of said other applicant" (R. 129).

On the same day Eastern moved before the Board in the alternative that the Board (1) confine the scope of the proceeding strictly to Eastern's application Docket 2396 or to that application and similar applications; or (2) limit the proceeding by prohibiting service between points outside the area set by the Board and points within such area; or (3) consolidate for hearing in the proceeding the various other Eastern applications including the amended application referred to above (R. 972-984).

The Board denied Eastern's motions (R. 1048-1053), and Eastern filed a petition in the United States Court of Appeals for the District of Columbia Circuit for review of the Board's orders.

The Court dismissed the petition for review because of the non-finality of the consolidation order, *Eastern Air Lines* v. *CAB*, 243 F. 2d 607, 609 (D. C. Cir. 1956).* However, the Court went on to give thorough consideration and dis-

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* The District of Columbia Circuit also dismissed substantially the same claim made by Eastern here, saying:

> "• • • Eastern says its new application [Pittsburgh-Detroit] is mutually exclusive with Northwest's Pittsburgh-Miami application, because the traffic, and so the competing service, to and from Miami is *through*, not merely to or from, Detroit. And in a very real sense this is true. But the same thing would be true of almost any new air-route segment. An application for a segment Washington-Norfolk [143 route miles apart] by a carrier which already offered service from Washington to points all over the nation, would really involve traffic between all those points and Norfolk. But competing applicants for the Norfolk segment would not for this reason be entitled to demand comparative consideration with all applicants for certificates from Washington or Norfolk to all other points and by this maneuver translate the proceeding into an examination of the entire national air-route structure. • • •"

cussion to Eastern's *Ashbacker* contentions. It said (p. 609):

> "• • • Eastern urges that, since its new applications are mutually exclusive to those of other applicants, it is entitled as of right to consolidation with them under the rule in Ashbacker. But it is quite clear that there must be some limitation to the Ashbacker rule when applied to air routes. • • • Despite Ashbacker it seems to us that the Board must have a measure of discretion in placing limits to the extent of a given proceeding. Certainly the Ashbacker doctrine is not available for mere tactical maneuver purposes. An existing certificate holder cannot by the mere filing of applications for routes transform a limited inquiry into a massive consideration of the whole of American air transportation. The problem is typically one for agency judgment. If the Board is not unreasonable in its limitation of a proceeding, the courts ought not to interfere, even if they have power to do so. We think the Board was not unreasonable in this instance."

After hearing, the Examiner found that the public convenience and necessity requires that a third carrier be authorized to operate over the Chicago-Miami route and recommended that National Airlines be selected as that third carrier. The Board, in its order of September 30, 1958, also found that a third carrier should be authorized to operate over the Chicago-Miami route and further found that Atlanta and Tampa should be intermediate points on the route. However, the Board went on to select Northwest as the third carrier. All flights of Northwest serving this route would be required to stop at Chicago.

Thereafter, Eastern filed in the Court of Appeals for the Second Circuit a petition for review and a petition for a stay of the Board's order. The stay was denied

and on October 7, 1959, the Court of Appeals issued its decision. (271 F. 2d 752.)

The Court below held that the bald assertion by Eastern of the existence of mutual exclusivity is not enough. Evidence must be introduced to support the assertion and Eastern failed to supply the deficiency. The Court said:

> "in an area proceeding where an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the Agency may treat the objection as not having been made."

This holding of the Second Circuit was in complete accord with prior decisions of the District of Columbia Circuit. See *Delta Airlines* v. *Civil Aeronautics Board,* 228 F. 2d 17 (D. C. Cir. 1955), *National Airlines* v. *Civil Aeronautics Board,* 249 F. 2d 13 (D. C. Cir. 1957).

The decision of the Court below with respect to the other contentions of Eastern and with respect to the contentions of Capitol are discussed in the Argument below.

ARGUMENT.

REASONS FOR DENYING EASTERN'S PETITION

POINT I.

The Court below correctly decided that the Board's findings were adequately stated and supported by substantial evidence.

In Point I of its brief, petitioner Eastern makes the claim that this Court should grant its petition for certiorari because the standard of "public convenience and necessity" as applied to air transportation needs clarification. Yet

Eastern fails to cite a single instance of confusion either in the Civil Aeronautics Board or in the Courts with respect to the application of this standard. The standard has been part of the Civil Aeronautics Act since its enactment in 1938 and has been applied in innumerable cases without difficulty. There appears to be no valid reason or need for the "clarification" requested.

The Civil Aeronautics Board made findings in this case, with respect to the large size and substantial growth of the Chicago-Miami market (R. 15210), the potential for continued long-term growth of that market (R. 15210), the shortcomings of the service that had been offered by petitioner and Delta Air Lines (R. 15210-15221), the fact that the passenger load factors between Miami and Chicago which had been experienced by petitioner and Delta had been so abnormally high as to cause positive doubt as to the adequacy of the service being rendered by those carriers (R. 11380, 15211-15225), and the fact that the diversionary effect of the certification of a third carrier on the Chicago-Miami route was outweighed by other factors and would not seriously impair Eastern's financial position (R. 15215, R. 15222-15223, R. 15225-15226).

The Chicago-Miami air travel market, both in terms of passengers and passenger miles, had been the largest market served by only two air carriers in the country. It was more than twice as large as the next largest two-carrier market—San Francisco-Seattle. In fact the Chicago-Miami market was larger than any other major long-haul Chicago market served by three or more carriers, including Chicago-Los Angeles, Chicago-Washington, Chicago-San Francisco and Chicago-Philadelphia (R. 15210).

The findings on size of market and inadequacy of service naturally led the Board to conclude that the additional competition which would be provided by a third

carrier was required in the public interest (R. 15222-15225).

In spite of these comprehensive findings, which are amply supported by the evidence, Eastern contends that the Civil Aeronautics Board, before certificating a new carrier on the Chicago-Miami route, was required to make "a finding weighing the size of the market against the capacity to be offered by all carriers and the cost to all of serving it" (Petition, pp. 16-17). On its face, this proposed new finding deals with the merits of the case and has no relevance to whether certiorari should or should not be granted here. Nevertheless, since the proposed finding illustrates the philosophy of Eastern's approach before the Civil Aeronautics Board and before the Courts, we believe further discussion of it is warranted.

The position of Eastern in effect is this: Added capacity results in lower load factors and thus increases expense per passenger mile; the more aircraft, the greater the expense. (The corollary of this is that Eastern has kept profits up and costs down by providing less than adequate capacity). Now that it faces competition, Eastern has said that it is willing to supply whatever additional aircraft are required on the route. However, says Eastern, the Board must make a finding as to the total capacity which all carriers will afford and the resulting expense to all carriers before placing on the route additional capacity from any airline other than Eastern and Delta. But since Eastern has said that it alone is prepared to supply all the capacity the route requires, any added capacity automatically produces an uneconomic result. Thus, no additional carrier could ever be certificated on the route if Eastern's view were to prevail. Eastern's premise now becomes apparent. It is simply this: A carrier enjoying a

monopolistic position on a heavily traveled route should be protected from competition forever.

The stated Congressional intent is to encourage competition in the establishment of a nationwide airlines system, not to protect monopoly (see Section 2(d) of the Civil Aeronautics Act, 49 U. S. C. §402(d)).

The determination of the need for an additional carrier when the Board has made findings as to the size of the market, the adequacy of past service and the other matters above set forth is one falling peculiarly within the expert knowledge of the agency concerned.

Notwithstanding Eastern's insistence that the Board should make a finding which requires a forecast of the capacity to be offered by all carriers and the cost to them, Eastern made no showing of the diversion of traffic and financial effect which it might suffer if a third carrier were added to the route. To the contrary, at the hearing, its witness declined to sponsor (i.e., swear to the underlying assumptions) an exhibit prepared by Eastern estimating the revenue diversions that it would experience and the exhibit was therefore excluded from the record (R. 1502-1522).

We have been unable to find any justification for the new and complex finding sought by Eastern either in applicable statutes or in prior decisions of this or any other court.* To the contrary, this Court, in *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 96-97 (1953), refused to require a comparable finding:

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* The decision of the Board here was supported by substantial evidence, and no element of abuse or unfairness as to the Board's findings has been urged by Eastern which could be deemed sufficient to set aside the Board's determination in this specialized area. See *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535-536 (1946); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

"In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conf.* v. *United States,* 342 U. S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, *cf. Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 348 * * *."

POINT II.

The decision of the Court below with respect to the application of the *Ashbacker* doctrine is correct and does not conflict with the decision of the Court of Appeals for the District of Columbia Circuit.

Eastern urges, as an additional reason for granting its petition for certiorari herein, that the Civil Aeronautics Board and the courts have been confused with respect to the application of this Court's decision in the *Ashbacker* case and that the "courts have struggled with the application of *Ashbacker* to air route cases for over ten years . . ." While we do not agree with this contention, it has no application to the decision of the Court below since the question of applying the *Ashbacker* doctrine is not presented on the facts of record in this case.

For the same reason, we do not agree with Eastern's contention that certiorari be granted because of a "conflict" between the decision of the Court below and the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines, Inc.* v. *Civil Aeronautics Board* (Pet., Appendix C) in the application of Ashbacker.

We believe that the cases are entirely consistent and that the Court of Appeals for the District of Columbia would have decided the *Great Lakes Case* in the same way as did the Court of Appeals for the Second Circuit.

In the one case (the *St. Louis-Southeast Service Case*) a prima facie indication of mutual exclusivity had been established. In the other case (the *Great Lakes Case*) it had not.

The *Ashbacker* Doctrine.

Ashbacker arose under the Federal Communications Act and involved applications for a single radio frequency. The FCC itself found that simultaneous operation over two stations on this frequency was physically impossible and that the two applications were mutually exclusive. Nevertheless, the Commission granted one of the applications prior to hearing the other application. This Court held the Commission's action to be improper.

All *Ashbacker* held was that where there are two mutually exclusive *bona fide* applications for a license, "the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." [326 U. S. 327, 333] This is no more than a requirement of fair hearing.

The *Ashbacker* Doctrine Has No Application To This Proceeding.

A.

Eastern's entire argument that the Civil Aeronautics Board did not comply with the *Ashbacker* doctrine is predicated upon its claim that its application for authority to operate between the Twin Cities and Florida by way of Chicago (Docket No. 3207) should have been consolidated with the *Great Lakes-Southeast Service Case.*

Eastern's petition (pp. 13 *et seq.*) discloses no injury flowing from the asserted failure to apply the *Ashbacker* doctrine, nor does it specify the relief* which it seeks.

The fact is that Eastern has suffered no injury since, in another proceeding decided during the pendency of the case below, the *Chicago-Milwaukee-Twin Cities* case, Docket 3207, *et al.;* Order No. E-13890 (May 19, 1959), Eastern has already been awarded a route comparable with the route resulting from the connection of the Chicago-Miami route awarded to Northwest in the *Great Lakes* case with its pre-existing Twin Cities-Chicago authority. In addition, Eastern received in the *Chicago-Milwaukee-Twin-Cities* case full comparative consideration on its application for a non-stop route between the Twin Cities and Miami.

In the Chicago-Milwaukee-Twin Cities proceeding Eastern was awarded two routes to Miami from the Twin Cities, one via Chicago with a stop at an intermediate point between

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* In the *St. Louis-Southeast Service* case, with which Eastern alleges the decision below is in conflict, the relief granted was a remand to the Civil Aeronautics Board for action by it consistent with the opinion in that case, i. e., the imposition of a condition which would prevent single plane service (such as a required change of planes at St. Louis) pending a hearing on mutual exclusivity.

Chicago and Miami, and one via Cincinnati.* Eastern also received a route between Chicago and Milwaukee and the Twin Cities, with a restriction as to long-haul service. In this same proceeding Northwest was awarded a non-stop Twin Cities-Miami route.

In view of the grant to Eastern of two routes to Miami from the Twin Cities and the opportunity given it of full comparative consideration as to whether it should be the non-stop carrier on the route, there is no relief which can be granted to it in this proceeding which would improve its position with respect to the Twin Cities-Miami application.** The Board's action in the *Twin Cities* case demonstrates that economic mutual exclusivity could not have been shown by Eastern in the instant proceeding, and explains Eastern's failure to produce evidence on the question although its right to do so was explicitly affirmed by the Examiner during the hearing (R. 2623-6).

B.

There is no conflict between the decision of the Court below and that of the Court of Appeals for the District of Columbia Circuit, since the facts in the case below did not raise for consideration any question of application of the *Ashbacker* doctrine. Instead, the decision below rests on the failure of Eastern to make any showing of mutual exclusivity although afforded an ample opportunity to do so. In the decision rendered by the Court of Appeals for the

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* The air mileage distance between the Twin Cities and Miami via Cincinnati is 1,552 miles compared with 1,531 miles via Chicago.

** There does not appear to be any requirement that under *Ashbacker* the comparative consideration be afforded in the same hearing. See *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946); *Western Airlines* v. *CAB*, 184 F. 2d 545 (9th Cir. 1950).

District of Columbia Circuit the evidence supported and the decision held that a *prima facie* indication of mutual exclusivity had been established.

The Court of Appeals for the District of Columbia Circuit had before it a case in which the Civil Aeronautics Board had itself made findings which established the *prima facie* case of mutual exclusivity necessary to invoke the *Ashbacker* doctrine. Thus, the Court said (Pet., Appendix C10, C11):

> "So the first debated question is whether a *prima facie* showing was made that the TWA award via St. Louis would create in an inadequate market an effective competitor in the southern transcontinental market. The problem, let us remember, is not whether the award should be made but whether these other applicants were entitled to a hearing on the matter. We think we need go no further than the Board's own findings to secure the answer.
>
> "In its initial opinion which supported the order in the proceeding now before us, the Board emphasized that the route to be awarded TWA, involving only 12 per cent circuity over a more direct routing between the Southeast and the West Coast, would provide a convenient alternative service to the existing National-Delta-American Interchange. It noted American's estimate that the new award would divert about 50 per cent of the existing interchange traffic.
>
> "In prior proceedings the Board had concluded that the available business would not support two southern transcontinental interchange arrangements. In 1951, after a comparative hearing of all then-pending applications, it licensed a single-plane Florida to California service via New Orleans-Dallas by an interchange arrangement operated by American, Delta and National. A year later the Board, without further hearings, authorized a competitive interchange service.

This court issued a stay, and thereupon the Board revoked the award and ordered an evidentiary hearing. The Board then found that the proposed new service would be hopelessly uneconomic and denied the certificate. One finding of the Board was that:

> '• • • the record now shows that the proposed interchange could not obtain for itself sufficient traffic to meet the expenses of even one daily round trip from the west coast to Miami.'

"The Board later reexamined its findings, opinion and decision and reaffirmed its conclusions. Thus the Board in 1954 concluded, after extensive evidentiary hearings, that the potential traffic between the Florida coast and the California coast was not sufficient to justify two competitive interchange services."*

Thus, the District of Columbia Circuit was faced with the same question which this Court had before it in *Ash-*

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* Eastern suggests that it made precisely the same showing before the Board in the *St. Louis-Southeast Service* Case as it did in the *Great Lakes* case (Petition, p. 21). But in the *St. Louis-Southeast Service* Case Eastern had the benefit of the evidence introduced by American Airlines and of findings in recent prior proceedings of the Board. The Court there said in respect of Eastern's transcontinental service:

> "Therefore, looking at the matter from the standpoint of a transcontinental service, Eastern occupies substantially the same position occupied by the other applicants for transcontinental certificates, discussed by us in I *supra.*" (Appendix C18)

And again in a footnote, referring to the case of *Delta Airlines* v. *Civil Aeronautics Board*, 228 F. 2d 17 (D. C. Cir. 1955), the Court said that the reasoning of the *Delta Airlines* case "requires the same kind of hearing in a case such as this [*i. e., Eastern*], where a *prima facie* showing is made of mutual exclusivity . . ."

The Court's finding in "I *supra*" quoted in the text above, pages 20-21, was that, based upon the evidence submitted by American and prior proceedings, a *prima facie* case had been established indicating that the transcontinental route was mutually exclusive with that granted to TWA.

There was nothing comparable in the *Great Lakes* case.

backer and its decision was the same, that is, that where the administrative body itself had made findings indicating that two applications were mutually exclusive, one application could not be granted without affording a hearing to the loser.

In the instant case this *prima facie* indication of economic mutual exclusivity is not present. The findings referred to by the District of Columbia Circuit do not appear in this record and Eastern did not attempt to make up the deficiency by introducing evidence showing economic mutual exclusivity. The absence of such proof here was the reason why the Court below held that the Board's procedure in this case did not violate the *Ashbacker* doctrine:

> "On the other hand, it also seems clear that although a given award may adversely affect competitors' applications for other routes, this possible adverse effect of itself does not create an *Ashbacker* situation. Rather mutual exclusivity must be established. In this and other area proceedings, when faced with the protests of carriers who have applied for routes outside the geographic limits of the Board's consolidation order, the Board has adhered to the practice of permitting these carriers to intervene and contest the issue of mutual exclusivity. This procedure was expressly approved in *National Airlines* v. *CAB,* 249 F. 2d 13 (D. C. Cir. 1957). It was followed scrupulously in the present case. Eastern was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none. This failure to make any showing of mutual exclusivity is fatal to Eastern's *Ashbacker* contentions. The cases which have dealt with this problem clearly suggest that it is incumbent upon the applicant asserting mutual exclusivity to substantiate the claim before the agency. *Delta Air Lines* v. *CAB, supra; National Air Lines* v. *CAB, supra.* We hold that in an area proceeding where

an applicant objects to exclusion of his application by a consolidation order, and does not submit evidence in support of his objection, the agency may treat the objection as not having been made." (Pet., Appendix B5, B6)

C.

A further distinction between the two cases is that in the *St. Louis Southeast Service Case* the Board, after first indicating that it was not going to consider questions relating to the southern transcontinental route in fact, according to the District of Columbia Circuit Court, transformed the nature of the proceeding and treated the case as if it were a transcontinental case, basing its award to TWA on the benefits afforded by the alternative transcontinental service which it could provide (Pet., Appendix C14).

D.

We suggest that the Circuit Court for the District of Columbia would have reached the same decision in the *Great Lakes* case as did the Court below. That Court was familiar with the earlier proceedings in this case. Yet, in the *Southeast Service* case, that Court did not disapprove its earlier decision dealing with Eastern's first attempt to invoke the *Ashbacker* doctrine in this proceeding (*Eastern Airlines* v. *CAB,* 243 F. 2d 607 (1956)). Indeed, the Circuit Court for the District of Columbia in the *Southeast Service* case cited that earlier decision in support of the right of the Civil Aeronautics Board to fix an appropriate area (Pet., Appendix C7).

Moreover, at the time the Court of Appeals for the District of Columbia Circuit deliberated on the Southeast Service case (Delta Air Lines) it had before it the decision

of the Court below.* Had there been any necessity for the Circuit Court of the District of Columbia either to disagree with or distinguish the decision of the Court below, it had full opportunity to do so. We submit that it is of significance on the question of conflict that it did not do so, and that, indeed, an inference is proper that it found no necessity to do so since the cases were not only reconcilable but in accord.

POINT III.

The Board's press release announcement did not result in a prejudgment of the case.

Petitioner Eastern, in its Point III, contends that the Board's issuance of a press release announcement of its tentative vote makes its final order and opinion invalid.**

Eastern's attack on the Board's press release is premised on the dual contention that the tentative vote, announcement of which was released to the press, was made "prior to consideration of all the evidence" and that the final order was based upon "data which were not even

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* The Board filed the decision of the Court below, which was rendered October 6, 1959, with the District of Columbia Circuit approximately two months prior to the issuance of its decision on December 10, 1959.

** Eastern has not, either in its petition to this Court or in the Court below, referred to any decision in which a claim of bias or prejudice has been made as a result of post-hearing statements. Nor can a tentative vote, carefully and fairly reached after consideration of the facts and the law, at all be considered the equivalent of pre-hearing remarks tinged with bias or prejudice, as in *Gilligan, Will & Co.* v. *SEC*, 267 F. 2d 461 (2d Cir. 1959), cited by Eastern.

Courts have uniformly refused to "probe the mental processes of the Board", even where statements were made prior to hearing which indicated a pre-judgment by the administrative body. See *United States* v. *Morgan*, 313 U. S. 409 (1941); *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219, 236 (1947); *Lumber Mutual Casualty Insurance Co.* v. *Locke*, 60 F. 2d 35, 38 (2nd Cir. 1932).

in existence at the time of its press release." These are both factual questions specifically presented to the Court below on petition for rehearing and rejected by it. Eastern has no basis for the former position and is simply wrong on the facts as to the latter.

The Voting Results Were Announced Only After Full Hearing and Consideration Were Given to the Issues in the Proceeding.

The issuance of the press release by the Board was preceded in this case (as in other Board proceedings in which the so-called press release procedure is utilized) by all the procedural steps provided for in the Civil Aeronautics Act and in the Administrative Procedure Act to insure a fair hearing.*

The two press releases announcing the Board's tentative votes (R. 15118-15124, App. 1275a-1281a) were issued on March 26 and March 31, 1958, approximately two months after oral argument before the Board on January 28-30. During this two month period the Board had the matter under advisement. Indeed, the initial decision of the Examiner had been submitted to the Board on November 5, 1957, or five months earlier. Moreover, the tentative decisions were released only after a series of meetings of Board members and certain of their staff assistants at which the route authorizations were discussed and votes taken. These meetings took place on March 19, 25, 26 and 27, 1958 (App. 1571a-1585a).

It is only an exercise in imagination to say, as Eastern does, that there was no consideration of the evidence in the

* Those steps included conference, exceptions and exchange of evidentiary exhibits before hearing; evidentiary hearings before an Examiner lasting seven weeks; filing of briefs to the Examiner; the Examiner's initial decision; exceptions thereto; filing of briefs to the Board; oral argument before the Board; conferences by the Board and staff assistants and tentative votes on the awards.

record prior to the tentative vote or that Eastern was denied due process.

The Board's Tentative Vote on Route Authorizations Was not its Final Order and Decision.

Both releases explicitly stated:

> "This announcement does not constitute the Board's decision in these cases which will be entered and issued at a later date."

Following the issuance of the press releases, the process of preparing the Board's opinion and final order was undertaken, and the Board rendered its final decision on September 30, 1958.

The Board does not feel itself bound by its press release announcements if, during the course of preparing its opinion and final order in a proceeding, it wishes to change its earlier vote.

For example, in the *Seven States Area Case,* Order No. E-13254 (1958) where the Board had announced by press release its tentative vote to award a route to Ozark Airlines, in its final decision the Board awarded the route instead to North Central Airlines.

Indeed, even a final order is subject to reconsideration, and the Board does not hesitate to make a change where it desires to do so. Thus, in the *Chicago-Milwaukee-Twin Cities Service Case,* Docket 3207, *et al.,* the Board issued a press release (December 5, 1958) and at a later point a final order (Order No. E-13890, May 19, 1959) extending Eastern's existing route between Southeastern cities and Chicago beyond Chicago to Milwaukee and the Twin Cities, with a three-stop restriction on all flights originating or terminating south of Chicago. In its order on reconsideration (Order No. E-14443, September 15, 1959) the Board changed this to a one-stop restriction on flights which by-pass

Chicago via Cincinnati and a two-stop restriction on flights via Chicago.

The final order of the Board was based on material facts in the record at the time of the press release announcements and properly referred to additional facts stipulated in the record.

Eastern contends that the 1957 air traffic data referred to by the Board in its Order No. E-13024, dated September 29, 1958, was "not even in existence" at the time of the press releases in March 1958 (p. 23 Eastern's Petition). This contention is at variance with the facts. Moreover, it ignores Eastern's specific agreement allowing the Board to utilize post-hearing data.

Eastern had stipulated that this and other pertinent factual data issued by or submitted to the Board up to the date of its final decision would be a part of the record, and thus waived any right to object to the use by the Board of all this data (R. 16025 E-F, 3420-1).

The September 1957 air traffic surveys were *published* in the summer of 1958, *prior* to the final order of the Board. They are clearly within the terms of the stipulation.

The September 1957 traffic data for the Chicago-Miami market were clearly available to the Board and to the parties to this proceeding well prior to March 1958 when the press releases were issued. Northwest in fact referred to material for the September 1957 survey period, contained in reports submitted to the Board *by Eastern and Delta,* in Northwest's January 13, 1958 brief to the Board, two weeks prior to oral argument in this case and more than two months prior to the Board's press releases.

Even without regard to the stipulation referred to above and excluding the post-hearing data referred to in the Board's order, the Board had more than "substantial

evidence" before it in support of its decisions. See §10(e) of the Administrative Procedure Act, 5 U. S. C. §1009(e); *NLRB* v. *Stow Mfg. Co.*, 217 F. 2d 900, 905 (2d Cir. 1954), *cert. denied*, 348 U. S. 964 (1955). Thus, Eastern has not demonstrated that it was prejudiced by any reference by the Board to alleged post-press release data.

Indeed, the 1957 figures reflected in the Board's opinion and referred to by Eastern were not significantly different from those for 1956. They merely served to show that basic trends indicated by the 1953-56 data introduced at the hearing continued to the most recent date for which figures were available to the Board.*

The Board in referring to 1958 traffic in its supplemental opinion was answering Eastern's contention on petition for reconsideration that 1958 traffic data seriously reversed prior trends (R. 15990-2, App. 1472a-1473a).

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* Thus, at R. 15210 the growth in the Chicago-Miami market was shown to be from 180,817 in 1953 to 304,837 in 1956, with a further small increase to 313,001 in 1957. Similarly, at R. 15211 the Tampa-St. Petersburg-Chicago passengers were shown to have increased from 31,629 in 1953 to 72,215 in 1956 with a further small increase to 74,464 in 1957. Similarly, Atlanta-Chicago passengers were shown to have increased from 37,323 in 1953 to 50,466 in 1956 with a further small increase to 52,767 in 1957.

REASONS FOR DENYING CAPITOL'S PETITION

POINT I.

The Court below correctly decided that "the findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence."

Petitioner Capitol, in its Point I, misconstrues the opinion of the Court below to hold that *"no findings whatsoever are necessary"* where the Board denies a route application, and then assigns this as a reason for this Court to grant the writ of certiorari. (Capitol Petition, page 5)

The Court below actually stated that

> "where one of competitive applications is held preferable to the others from the standpoint of public interest, no *further* findings with respect to the unsuccessful applicants is required." (271 F. 2d at 760) (Emphasis added)

It is apparent that the Court did not hold that comparative findings were unnecessary and, in fact, comparative findings were made by the Board on the numerous applications. The Court believed that no "further" findings were called for and cited a case holding just that. *Continental Southern Lines* v. *CAB*, 197 F. 2d 397, 402-403 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 831.

After making the above quoted statement, the Court below went on to *hold* that

> "The findings leading the Board to select Northwest and Delta in preference to Capitol are sufficient and are supported by substantial evidence." (271 F. 2d at 760)

Of the seven carrier applicants for the Chicago-Miami route, the Board, on carefully stated grounds, ultimately selected Northwest. None of the unsuccessful applicants other than Capitol has challenged the selection of Northwest.

The Board squarely met any applicable requirements of *Schaffer Transportation Company* v. *U. S.*, 355 U. S. 83 (1957), cited by Capitol (Petition, page 6), and the holding of the Court below is consistent with that case. In *Schaffer*, this Court stated that where the ICC decided not to authorize a new service and denied the one application to provide such service, it must set forth its reasons for so deciding. Here, the CAB decided to authorize additional service between Chicago and Miami and granted one of seven applications to provide such service. The Board and the Examiner (whose findings the Board adopted) set forth comprehensively and clearly its reasons for authorizing additional service and for preferring Northwest from among the seven applicants, of which Capitol was one.

POINT II.

The Court below correctly decided that the appearance of members of Congress at public oral argument before the Board, in accordance with the published rules and established practice of the Board, was not improper and violated no rights of Capitol.

Petitioner Capitol, in its Point II, claims that it was denied a fair hearing by reason of the appearance of members of Congress who made statements at the public oral argument before the Board in this case and who, in some instances, submitted statements in writing and telegrams at

the oral argument to be placed on the record. Because several of the statements of the various members of Congress or persons speaking for them supported additional service to the communities which they represented that would result from certification of Northwest, Capitol claims that the agency's "judicial character" was violated by "political influence". Capitol also asserts that these appearances were "without prior notice" to it.

Members of Congress Appeared Openly for a Proper Purpose in This Proceeding.

There is no suggestion or claim by Capitol that there was any tampering with members of the Board by Congressmen or any other person acting on behalf of Northwest. The only point of contact complained of by Capitol between members of Congress and members of the Board took place at public oral argument on the record.*

Accordingly, there is no basis for applying in this case recent decisions cited by Capitol which deal with covert, *ex parte* contacts with members of the Federal Communications Commission.**

In this proceeding various members of Congress or persons speaking for them, together with similar appearances on behalf of states or their aeronautics commissions, pre-

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* As the Court below held, whether or not Northwest contacted Congressmen is immaterial; the only pertinent question is whether members of Congress or others contacted members of the Board in an improper manner. There is not the slightest indication in this case of any contact between members of Congress or others with members of the Board other than at public sessions of the Board on the record, and Capitol makes no claim to the contrary.

** *Sangamon Valley Television Corp.* v. *United States*, 358 U. S. 49 (1958), remanded, 269 F. 2d 221 (D. C. Cir. 1959); *WIRL Television Corp.* v. *United States*, 359 U. S. 51 (1958) and *WORZ Inc.* v. *FCC*, 358 U. S. 55 (1958), remanded, 268 F. 2d 889 (D. C. Cir. 1959).

sented statements at the oral argument. Persons so appearing urged the general interest of their localities in obtaining new air service and some members of Congress from areas served only by Northwest supported Northwest's certification.

A reading of the statements will disclose that the presentations were entirely reasonable ones in furtherance of representing the general interests of their constituents. (R. 14530-74, 14712-16, 14729-30, 14806-09, 14775-77, 14904-07, 14993-99, 15007-12, 15012-17, 15019-23, 15025-26).

Presentation Of Oral Argument By Representatives Of The Legislative Branch Of The Government Was Specifically Permitted by Board Regulations.

The Board conducts its certification proceedings pursuant to Section 401 of the Civil Aeronautics Act. Section 401(c) provides that

> "any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate."

Pursuant to this Section the Board has adopted in its Rules of Practice in Economic Proceedings, Rule 14 which provides:

> "Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in any enforcement proceeding, and present any evidence which is relevant to the issues. • • • In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned" (14 C. F. R. §302.14).

In view of the Board's published rules and the common practice, which had naturally followed, Capitol could not have been "surprised" at the appearance of members of Congress in this proceeding.

The Board's rule avoids *ex parte* presentations and covert influence and encourages open statements on the record. As argument, those statements are not regarded or treated by the Board as evidence.

Section 300.2 of the Board's Procedural Regulations, cited by Capitol (Petition, p. 14), prohibits private communications and off-the-record efforts to bring pressure or influence to bear upon the members of the Board of its staff, and emphasizes the judicial character of the Board's proceedings. This section clearly has no application to arguments made upon the record specifically permitted by Section 302.14 of the Board's Procedural Regulations (quoted above). There was no failure by the agency to follow its prescribed procedure as was involved in *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), or *Service* v. *Dulles*, 354 U. S. 363 (1957), cited by Capitol.

We suggest that the Board's rules and any amendments thereto with respect to persons permitted to appear at hearings or oral arguments are a matter for the administrative agency concerned or for Congress, and that no justiciable right of a participant in Board proceedings has been violated by the appearance of representatives of the legislative branch of the Government.

Capitol Made No Claim Before the Board That The Congressional Appearances were Improper.

Capitol made no objection before the Board to any of the statements by members of Congress of which it now complains, nor did it suggest that the Congressional repre-

sentations were prejudicial or raised any new factual or legal questions requiring an opportunity to reply.* Capitol first raised this claim before the Court of Appeals below. Consequently, the sole contention of Capitol made in its petition to this Court is barred from consideration under Section 1006(e) of the Civil Aeronautics Act, 49 U. S. C. §646(e). That section precludes consideration by a reviewing court of matters not urged to the Board unless there were reasonable grounds for the failure to do so. Capitol here alleges no such grounds, nor are there any. Hence, its claim should be barred. See *United States* v. *Tucker Truck Lines*, 344 U. S. 33 (1952); *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 183 F. 2d 975 (D. C. Cir. 1950).

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* In its petition for reconsideration, filed ten months after the oral argument, the only contention made by Capitol was that the statements by Congressmen had the effect of extending the time allotted Northwest for oral argument (R. 15292-15295). In this connection Capitol's reference to its "unsuccessful request for additional time for argument" (Pet., pp. 3, 13) was not related to the appearance of Congressmen at the oral argument. Capitol's request was made prior to oral argument at the same time that the Chief Examiner assigned time for argument by the parties. Every other applicant party made a similar request for additional time and every applicant's request, including that of Capitol, was denied by the Board. Capitol's and the other carriers' requests, and the Board's denial of the requests, were made without reference to the appearance of Congressmen at the oral argument. Capitol did not renew its request for additional time and, as stated, objected to the Board's allocation of time only when it filed its petition for reconsideration ten months after oral argument.

Conclusion.

For the foregoing reasons, we respectfully submit that the petitions of Eastern and Capitol for writs of certiorari should be denied.

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April 11, 1960.

CERTIFICATE OF SERVICE

I, C. Frank Reavis, attorney for Northwest Airlines, Inc., and a member of the bar of the Supreme Court of the United States, hereby certify that on April 11, 1960 I served a copy of the foregoing Brief in Opposition to Petitions for Writ of Certiorari upon the persons listed below, by mailing copies, in duly addressed envelopes, with first class postage prepaid, as follows:

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APPENDIX A

Statutes Involved

Civil Aeronautics Act of 1938 as amended, 52 Stat. 977, formerly 49 U. S. C. A. §401, now 49 U. S. C. A. §1301:

Section 2:

DECLARATION OF POLICY

In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transporation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

(52 Stat. 980, formerly 49 U. S. C. A. §402, now 49 U. S. C. A. §1302; subsections (e) and (f), not pertinent here, have been slightly modified)

Section 401 (c):

NOTICE OF APPLICATION

Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

Section 401 (d) (1):

ISSUANCE OF CERTIFICATE

The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(52 Stat. 987, formerly 49 U. S. C. A. §481 (c) and (d) (1), now 49 U. S. C. A. §1371 (c) and (d) (1))

Section 1005(f):

FORM AND SERVICE OF ORDERS.

Every order of the Board shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

(52 Stat. 1023, formerly 49 U. S. C. A. §645(f), now 49 U. S. C. A. §1485(f)).

Section 1006:

ORDERS OF BOARD SUBJECT TO REVIEW.

(a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the peitition theretofore.

(52 Stat. 1024, 63 Stat. 107, formerly 49 U. S. C. A. §646(a), now 49 U. S. C. A. §1486(a)).

FINDINGS OF FACT BY BOARD CONCLUSIVE.

(e) The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(52 Stat. 1024, formerly 49 U. S. C. A. §646(e), now 49 U. S. C. A. §1486(e)).

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. A. §1001:

Section 8:

In cases in which a hearing is required to be conducted in conformity with section 7—

(b) SUBMITTALS AND DECISIONS—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

(60 Stat. 242, 5 U. S. C. A. §1007(b))

Section 10(a):

RIGHTS OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(60 Stat. 243, 5 U. S. C. A. §1009(a))

Section 10(e):

SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

(60 Stat. 243, 5 U. S. C. A. §1009(e))

Civil Aeronautics Board Rules of Practice in Economic Proceedings, 14 C. F. R. §302.14:

§302.14 *Participation in hearings by persons not parties.* Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly. Such persons may also present to both the Examiner and the Board a written statement on

the issues involved in the proceeding. Such statement shall conform to the requirements of these rules as to form, content, service, and time of filing of briefs to the Examiner and the Board. In addition, a representative of any department, agency or branch of the Federal Government or of any state government (including a state aviation commission) may appear and present oral argument in any proceeding in which argument has been assigned. [§302.14 as amended by Amendment No. 2, effective August 1, 1952, 17 F. R. 7040; Amendment No. 7, effective May 1, 1953, 18 F. R. 2666.]

FILE COPY

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No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CAPITAL AIRLINES, INC., TO BE NAMED AS A PARTY RESPONDENT, FOR LEAVE TO FILE BRIEF IN OPPOSITION, AND BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF CAPITAL AIRLINES, INC., TO BE NAMED AS A PARTY RESPONDENT, FOR LEAVE TO FILE BRIEF IN OPPOSITION

Capital Airlines, Inc., hereby respectfully moves that it be named as a party respondent to this case and for leave to file the attached brief in opposition to the petition for a writ of certiorari.

The interest and standing of Capital Airlines arises from the fact that it was a party to the proceeding below, before the Civil Aeronautics Board, wherein it was granted authority to engage in scheduled air transportation over certain routes in competition with Petitioner, Eastern Air Lines, and was granted and holds authority to engage in scheduled air transportation over certain other routes for

which the Petitioner unsuccessfully sought authority.[1] Capital Airlines was also an intervenor and participated fully, both on brief and in oral argument, before the United States Circuit Court of Appeals for the Second Circuit in the case below, wherein the Petitioner unsuccessfully sought to have set aside those portions of the Civil Aeronautics Board Order adverse to Petitioner and favorable to Capital Airlines.[2] The Petitioner is now seeking, by writ of certiorari, review of the adverse judgment of the Court of Appeals below.

Thus, the Petitioner is requesting this Court to review and upon review to reverse, the judgment of the Court of Appeals upholding the validity of the Civil Aeronautics Board Order which granted Capital Airlines valuable operating rights and denied Petitioner operating rights, the grant of which would be adverse to Capital Airlines' interest. The issues of law and questions of fact raised by the Petitioner directly involve Capital Airlines, which has a substantial interest in the disposition of the petition for writ of certiorari.

Further, Capital Airlines, as a party to the proceeding before the Civil Aeronautics Board and as a recipient of substantial and valuable operating rights, would have standing to petition for a writ of certiorari under 28 U.S.C. § 1254(1) and 49 U.S.C. § 646(f) in the event the Court of Appeals below had held adverse to its interest. Therefore, Capital Airlines should have equal standing to defend its interest as a party respondent in the instant case where the decision in the Court of Appeals below, favorable to the interest of Capital Airlines, is being attacked by an adverse Petitioner.

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[1] The opinion and order of the Civil Aeronautics Board appears at pp. 1313a-1400a of the printed joint appendix used in the Court of Appeals below.

[2] The opinion of the Court of Appeals is printed in appendix B of the Petition and is reported at 271 F.2d 752.

WHEREFORE, Capital Airlines respectfully requests that it be named as a party respondent to this case and that it be permitted to file the attached brief in opposition to the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN AIR LINES, INC., *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CAPITAL AIRLINES, INC., IN OPPOSITION

OPINIONS BELOW

The opinions of the Civil Aeronautics Board are not officially reported. The original opinion of the Civil Aeronautics Board, its opinion granting and denying stay, and its second supplemental opinion on reconsideration, appear in the printed joint appendix used in the Court of Appeals below (J. A. 1313a-1400a, 1469a-1497a, 1509a 1536a).[1] The opinion of the Civil Aeronautics Board lifting stay (CAB Order No. E-13526, February 19, 1959) and its first supplemental opinion on reconsideration (CAB Order No. E-13728, April 10, 1959) have not been printed. The opinion of the Circuit Court of Appeals for the Second Circuit, printed in Appendix B of the Petition, is reported at 271 F.2d 752.

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[1] Citations to the joint appendix will be indicated by "J. A."

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the Civil Aeronautics Board make adequate findings based upon substantial evidence to support those portions of its Order adverse to Petitioner, particularly as to the economic feasibility of new competitive service over Petitioner's routes?

2. Did the Civil Aeronautics Board violate this Court's *Ashbacker* doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945) by awarding Northwest Airlines a Chicago-Florida route?

3. Did the public announcement by the Civil Aeronautics Board of its tentative vote on the major issues of this case constitute its decision within the meaning of section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U.S.C. § 1007(b)) and section 1005(f) of the Civil Aeronautics Act (52 Stat. 1023, 49 U.S.C. § 645(f))?

4. Were communications to the Civil Aeronautics Board concerning the equipment acquisition program of Capital Airlines, improper *ex parte* representations? Did the Board properly consider this matter?

STATUTES INVOLVED

The statutes involved, in addition to those set forth in the Petition, are sections 407 and 408 of the Civil Aeronautics Act of 1938 (52 Stat. 1000, 1001, 49 U.S.C. §§ 487, 488). These sections are printed in Appendix A hereto.[2]

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[2] The Civil Aeronautics Act of 1938, 52 Stat. 977 ff, 49 U.S.C. §§ 401-722, was replaced in all pertinent parts without material change by the Federal Aviation Act of 1958, 72 Stat. 737 ff. 49 U.S.C. §§ 1301-1542. Reference herein to "the Act" shall be to 1938 Act unless otherwise indicated.

STATEMENT

The Petitioner seeks review of the judgment of the United States Circuit Court of Appeals for the Second Circuit which affirmed Orders of the Civil Aeronautics Board in a "new route" proceeding known as the *Great Lakes-Southeast Service Case*. The Orders of the Civil Aeronautics Board granted and denied various applications for certificates of public convenience and necessity to perform new scheduled air transportation services.

The decision of the Civil Aeronautics Board as it affected the interest of Capital Airlines vis-a-vis Petitioner is as follows. Capital Airlines was granted an extension of its route No. 51: (a) from Pittsburgh to Buffalo via Youngstown, Akron-Canton, Cleveland and Erie; and (b) from Atlanta to Miami via Jacksonville, Tampa/St. Petersburg/Clearwater and West Palm Beach. Since Capital Airlines was already authorized to provide service from Buffalo, Cleveland, Pittsburgh and numerous other northern cities to Atlanta, the prime effect of the Civil Aeronautics Board's award was to extend Capital Airlines beyond Atlanta to Florida on a Buffalo-Cleveland-Pittsburgh-Florida route. Prior to this award, the Petitioner held monopoly rights between Cleveland, Pittsburgh and Florida, and no air carrier was certificated between Buffalo and Florida. The Petitioner's application for similar certificate authority between Buffalo and Florida was denied. Other pertinent awards include the certification of Northwest Airlines between Chicago and Florida and of Delta Air Lines between Detroit and Florida. Prior to these awards, the route between Chicago and Florida was served by both Delta Air Lines and Petitioner, and the Petitioner held monopoly rights between Detroit and Florida.

The award to Capital Airlines and the denial of the related proposals of Petitioner were supported with minor exceptions by the Civil Aeronautics Board's Bureau of Air Operations, an unbiased and independent party represent-

ing the public interest, and were recommended by the Hearing Examiner who heard the evidence.

In authorizing Capital Airlines to provide competitive service with Petitioner in the Cleveland-Florida and the Pittsburgh-Florida markets, and in selecting Capital Airlines over the Petitioner and other applicants as the carrier to provide new certificated service between Buffalo and Florida, the Civil Aeronautics Board found, *inter alia:* that the Cleveland-Florida and the Pittsburgh-Florida markets were among the top ranked noncompetitive markets in the country (J.A. 905a, 1337a);[3] that Petitioner's monopoly service in these markets was insufficient to meet the needs of the traveling public (J.A. 901a-902a, 1337a); that there was a need for new and improved air transportation between a number of cities in the Buffalo-Cleveland-Pittsburgh triangle and Florida (J.A. 901a-907a, 1337a); that the markets in question could support new and additional competitive service (J.A. 905a-907a, 1337a, 1490a-1493a); that there was a need for competition with Petitioner in this area and a need for a better competitive balance between Petitioner and Capital Airlines (J.A. 901a-907a, 922a-924a, 1337a, 1342a); that Capital Airlines had the greatest historic interest in the traffic and the greatest identity in the markets to be served (J.A. 922a-924a, 1338a, 1486a-1488a); that the selection of Capital Airlines would convenience a substantial volume of passengers with required new and improved air service (J.A. 924a-925a, 1338a-1340a); that the selection of another carrier would have a serious adverse effect upon Capital Airlines (J.A. 15230a, 1487a-1488a); that the award would benefit Capital Airlines and provide it with needed route strengthening (J.A. 1342a, 1487a); that there would be no serious injury to Petitioner or other carriers as a result of the award to Capital Airlines (J.A. 925a-932a, 1488a,

[3] Reference to pp. 592a through 974a of the joint appendix is to findings of the Hearing Examiner which were adopted by the Civil Aeronautics Board. See J.A. 1320a.

1490a-1493a); and that Capital Airlines was fit, willing and able to provide the new services authorized (J.A. 1340a-1343a, 1488a-1490a).

Petitioner, Eastern Air Lines, filed a petition for Judicial Review of the Civil Aeronautics Board's Order contending, *inter alia:* (1) that the Civil Aeronautics Board failed to make adequate findings based on substantial evidence to support those portions of its Order adverse to Petitioner, particularly with reference to the sufficiency of traffic to support new competitive service over Petitioner's routes; (2) that the Civil Aeronautics Board violated the *Ashbacker* doctrine[4] by failing to make findings on the issue of mutual exclusivity or to consolidate for hearing and decision Petitioner's application for new route authority beyond the area of investigation, the grant of which was allegedly precluded as a matter of economic fact by the certification of Northwest Airlines between Chicago and Florida; (3) that the issuance by the Civil Aeronautics Board of a press release announcing its tentative vote on the major issues six months prior to the release of its formal opinion and final decision was unlawful; and (4) that the Civil Aeronautics Board failed to consider as an element of Capital Airlines' "fitness" whether Capital made improper *ex parte* representation to the Board concerning its equipment program. These are substantially the same questions presented by the Petition for Writ of Certiorari.

As to the first contention, the Court below held "that an agency's determination that competition in and of itself was a desirable objective would be upheld provided that the agency based its determination upon its own expert knowledge of the industry under its control rather than on some general notion of national policy. In the present case the Board did determine that increased competition on air routes was desirable when there was sufficient traffic (fn.

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[4] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 (1945).

omitted). Therefore, further findings with respect to inadequacy of service, or benefits to be derived from competition, are unnecessary. We have examined the Board's findings on the size of the market and diversion and have found these findings adequately stated and supported by substantial evidence. * * *." (Petition, App. B, pp. B9-B10.) Indeed, the Civil Aeronautics Board findings on these issues are set forth in detail in the 383-page Initial Decision and its 145 pages of Opinions and Orders printed in the joint appendix (J.A. 592a-974a, 1313a-1400a, 1469a-1497a, 1509a-1536a). These findings in turn are supported by a record of some 16,000 pages.

On the second contention, the Court below held that "Eastern (Petitioner) was afforded an ample opportunity to present evidence on the issue of exclusivity. It presented none (fn. omitted). This failure to make any showing of mutual exclusivity is fatal to Eastern's (Petitioner's) *Ashbacker* contentions." (Petition, App. B, pp. B5-B6.) This holding was consistent with the Civil Aeronautics Board's findings and conclusions on the same issue. (J.A. 1482a-1486a.)

With regard to the third contention, the Court below held that "the press release expressly stated that the announcement of the awards did not constitute decisions in the case but that decisions would be entered later. We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion. * * * Eastern's (Petitioner's) claim of prejudgment is unsound. * * * [I]f the careful marshalling of the facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision." (Petition, App. B, pp. B6-B7.) This holding is consistent with the Civil Aeronautics Board's decisions on the same issue and its practice in connection with the announcement of its tentative vote by the press

release. (J.A. 1275a-1281a, 1495a, 1516a; *New York-Florida Case,* CAB Order No. E-10884, pp. 16-17, December 21, 1956.)

On the fourth contention, concerning alleged improper *ex parte* representation with respect to Capital Airlines' equipment program, the Court below held that "the communication to the Board * * * was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case* (fn. omitted). See *Van Curler Broadcasting Corp.* v. *United States,* 236 F.2d 727, 730 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC,* 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.) This holding is consistent with the Civil Aeronautics Board's ruling on the same issue. (J.A. 1488a-1490a.)

ARGUMENT

I

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The issues in the present case are primarily factual, and no amount of strained semantics can convert them into basic issues of law and policy warranting review by this Court on certiorari. To the extent that issues of statutory construction and legal principles are raised by Petitioner, these issues have long since been resolved by the courts and were consistently and correctly applied to the facts in this case.

To focus attention on precisely what is offered as issues for Supreme Court determination, the Petitioner first raises the question of the adequacy of the findings and the sufficiency of the evidence on the elements of public convenience and necessity to support the certification of new air service. (Petition, p. 2.) That sections 8(b) and 10(e) (60 Stat. 242, 243; 5 U.S.C. §§ 1007(b), 1009(e)) of the Administrative Procedure Act require decisions of ad-

ministrative bodies to be supported by adequate findings based upon substantial evidence is fundamental, and this principle can not possibly be considered to be at issue in the present case. This Court has on numerous occasions interpreted these statutory provisions and has set forth clear and definite guides for their application by the administrative bodies and the reviewing courts. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951); *National Labor Relations Board* v. *Columbia Enamel & Stamping Co., Inc.*, 306 U.S. 292 (1939).

Likewise, the basic considerations used in evaluating the public convenience and necessity for the issuance of a certificate to engage in scheduled air transportation pursuant to section 401 (52 Stat. 987, 49 U.S.C. § 481) of the Civil Aeronautics Act are clear. They are set forth in section 2 (52 Stat. 980, 49 U.S.C. § 402) of the Act and have been further delineated by the Civil Aeronautics Board in innumerable cases with the approval of the courts.[5] Peti-

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[5] *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572 (1950); *Lake Central Airlines, Inc.* v. *Civil Aeronautics Board*, 239 F.2d 46 (D.C. Cir. 1956); *American Airlines, Inc.* v. *Civil Aeronautics Board*, 192 F.2d 417 (D.C. Cir. 1951); *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 155 F.2d 169 (D.C. Cir. 1946); *Pan American World Airways Co.* v. *Civil Aeronautics Board*, 121 F.2d 810 (D.C. Cir. 1941); See Northwest Airlines, Inc.-Certificate of Public Convenience and Necessity, 1 CAB 573, 576-579 (1940), *general elements of public convenience and necessity;* Continental Air Lines, Inc.-Amendment to Certificate of Public Convenience and Necessity, 1 CAA 598 (1940), *improved passenger and mail service as elements of public convenience and necessity;* Colonial Airlines, Inc.-Washington-Ottawa-Montreal Service, 6 CAB 481 (1945), *adequacy of service as an element of public convenience and necessity;* Pennsylvania-Central Airlines Corp.-Norfolk-Knoxville Route, 2 CAB 207, *available transportation facilities as an element of public convenience and necessity;* National Airways, Inc.-Daytona Beach-Jacksonville Operation, 1 CAA 612, *economic characteristics as elements of public convenience and necessity;* Southwest-Northeast Service Case, CAB Order No. E-9758, Nov. 1955, *competition as element of public convenience and necessity.* These cited cases are by no means exhaustive on the

tioner's contention that there are no definitive guides as to the findings which must be made under section 8(b) and 10(e) of the Administrative Procedure Act on the element of "public convenience and necessity" to support an award pursuant to section 401 of the Act is not well founded. What the Petitioner is actually requesting this Court to do is to again review the record and the Board's findings and render an opinion on the adequacy of the findings and the sufficiency of evidence—something the Court below has already done in accordance with clear principles and criteria enunciated by this Court and established by statute.

Next, the Petitioner raises the question of the application of the *Ashbacker* doctrine to the individual facts of this case. There is no issue as to the validity of the *Ashbacker* doctrine or its application to new route proceedings before the Civil Aeronautics Board. The soundness of the fundamental principle that "where two *bona fide* applications are mutually exclusive the grant to one without a hearing to both deprives the loser of the opportunity which Congress chose to give him," announced by this Court in *Ashbacker* v. *Federal Communications Commission*, 326 U.S. at 327, is conceded by all parties. The *Ashbacker* principle was first applied to proceedings before the Civil Aeronautics Board in *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F.2d 777 (D.C. Cir. 1949). By a series of cases, the courts have applied the *Ashbacker* principle to a variety of factual situations and have evolved guides for its application to the unique problems of air route cases which fully protect the parties, right to a fair hearing on mutually exclusive applications.[6]

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subject and no one element is determinative, as each case must be decided in light of the particular circumstances surrounding the proposed new operation. However, the basic elements of public convenience and necessity are clear.

[6] *Northwest Airlines, Inc.* v. *Civil Aeronautics Board*, 194 F.2d 339 (D.C. Cir. 1952); *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 228 F.2d 13 (D.C. Cir. 1955); *Delta Air Lines, Inc.* v. *Civil*

There is no conflict in principle between this long line of cases and the present case concerning the *Ashbacker* doctrine, nor has there been a departure from these well-defined guides in the application of the *Ashbacker* doctrine to the facts in this case. In fact, the Petitioner has raised no significant issue of construction or application of the *Ashbacker* doctrine. Review is sought of a decision which turns solely upon analysis of the particular facts involved. Petitioner was afforded ample opportunity to present evidence in accordance with established *Ashbacker* principles to support its contention of mutual exclusivity. On the basis of the evidence, the Civil Aeronautics Board found that Petitioner did not sustain its burden of establishing that the grant of Northwest Airlines' application would, as a matter of economic fact, preclude a subsequent grant of Petitioner's application. The Civil Aeronautics Board further found that the facts of record clearly demonstrate that the award to Northwest would not preclude a later grant of Petitioner's application. (J.A. 1482a-1486a). The Court below affirmed. (Petition, App. B, pp. B5-B6.)

The third question raised by the Petitioner is the legality of the Civil Aeronautics Board's public announcement of its tentative vote upon the major issues of the case six months prior to the issuance of its decision and formal opinion. The Petitioner contends that section 8(b) of the Administrative Procedure Act requires that all decisions of administrative bodies must contain "findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law or discretion presented on

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Aeronautics Board, 228 F.2d 17 (D.C. Cir. 1955); *North American Airlines, Inc.* v. *Civil Aeronautics Board*, 241 F.2d 445 (D.C. Cir. 1957); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 243 F.2d 607 (D.C. Cir. 1956); *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 247 F.2d 562 (D.C. Cir. 1957); *National Airlines, Inc.* v. *Civil Aeronautics Board*, 249 F.2d 13 (D.C. Cir. 1957); *Delta Air Lines, Inc., et al.* v. *Civil Aeronautics Board*, Docket No. 14,798, *et al.*, D.C. Cir., Dec. 10, 1959).

the record." (Petition, p. 24.) That this is a correct recital of section 8(b) of the Administrative Procedure Act and a proper statement of the law is not controverted. However, the issue here presented is one of fact. That is, was the issuance of a press release announcing the tentative vote on certain issues a decision? The press releases specifically stated "that this announcement does not constitute the Board's decision in these cases which will be entered and issued at a later date." (J.A. 1276a, 1281a.) In the *New York-Florida Case*, CAB Order No. E-10884, pp. 16-17, Dec. 21, 1956, the Civil Aeronautics Board set forth in detail the public interest factors which prompted it to adopt the press release procedure and emphasized that a "press release is no more than a public statement of the tentative vote on a given case by a majority of the Board, and the vote is no more final in a case in which a press release is issued than it is when a press release is not issued." As indicated, the decision making process remained unchanged. "The release merely makes public what heretofore was intended to be confidential, and does not disturb the long established Board practice with respect to its deliberations on pending cases." The provisions of section 8(b) of the Administrative Procedure Act and section 1005(f) of the Civil Aeronautics Act were not violated by the mere public announcement of the tentative vote on the major issue of this case, nor did this procedure deny Petitioner a fair hearing, constitute a prejudgment of the case or otherwise prejudge its interest. The Court below so found. (Petition, App. B, pp. B6-B7.) See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219 (1947); *United States* v. *Morgan*, 313 U.S. 409 (1941); *Lumber Mutual Casualty Ins. Co.* v. *Locke*, 60 F.2d 35 (2d Cir. 1932). Clearly, this is not an issue warranting review by this Court.

Lastly, the Petitioner raises a question as to the validity of the award to Capital Airlines because of an alleged *ex parte* representation concerning its equipment program

made to the Civil Aeronautics Board during the pendency of the proceeding below. Here, again, the question involved is narrow and factual and there is no significant issue of policy or statutory interpretation presented for this Court's determination. It is well settled that private *ex parte* representations to members of administrative bodies directed to the issues of pending adversary proceedings with intent to influence their decision are improper and a basis on which an award may be vitiated. The principles under which this doctrine of fair play will apply have been clearly set forth by the courts. See *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959); *WKAT* v. *Federal Communications Commission*, 258 F.2d 418 (D.C. Cir. 1958).

However, the issue here is not whether such *ex parte* representations are a basis on which an agency's action may be vitiated but whether the communications between Capital Airlines and the Civil Aeronautics Board concerning its equipment acquisition program were improper or indeed *ex parte* under the clear principles enunciated by the courts. See *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727 (D.C. Cir. 1956); *cert. denied*, 352 U.S. 935 (1956). There is absolutely no controversy as to the extent and nature of the communications between Capital Airlines and the Civil Aeronautics Board. (J.A. 1489a-1490a.) The communications related to matters relevant to Civil Aeronautics Board functions under section 408 of the Act completely unconnected with the pending case. The communications made no reference to the present case and gave no indication that the information furnished to the Civil Aeronautics Board concerning Capital's equipment program was or should be considered in connection with the proceeding below. (J.A. 1498a, 1499a, 1500a.) In fact, it is clear from the Opinion below that such information was *not* relied upon in the selection of Capital Airlines to operate the Buffalo-Florida route. (J.A. 1489a-1490a.) Further, the communications between

the Board and Capital Airlines concerning its equipment acquisition program were entirely in the open, above board and consistent with the Civil Aeronautics Board's regulatory functions. The same information which was transmitted to the Civil Aeronautics Board was widely reported in the press and Capital Airlines, itself, publicly stated most of the details of the program, in sworn testimony before the Civil Aeronautics Board in the pending *General Passenger Fare Investigation*, CAB Docket No. 8008 (testimony of Mr. Carmichael, Tr. 4745-54; see also Ex. CAP 12, D, p. 6). Petitioner is a party to and was represented at that proceeding.

On the basis of these uncontested facts and on the basis of well-defined principles as to proper *ex parte* representation, the Court below held that "the communication to the Board * * * was not improper, for such information was relevant to the Board functions unconnected with the *Great Lakes-Southeast Service Case* (fn. omitted). See *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727, 730 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 935. There is no indication that Capital made any covert communications to members of the Board, and hence the recent case of *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.)

Clearly, review on these findings of fact, the correctness of which have been concurred in by the Civil Aeronautics Board and the Court below, is not warranted. As stated by this Court in *Gravel Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271 (1949) at 275, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in absence of a very obvious and exceptional showing of error." The Petitioner has made no such showing.

II

THE DECISION BELOW IS CLEARLY CORRECT

After an extensive eight week hearing and a searching examination and evaluation of the voluminous 16,000 page record by the Civil Aeronautics Board and its Hearing Examiner, the Board awarded Capital Airlines its route from Buffalo, Cleveland and Pittsburgh to Florida.

In authorizing Capital Airlines to provide competitive service with Petitioner in the Cleveland-Florida and Pittsburgh-Florida markets, and in selecting Capital over the Petitioner and other applicants as the carrier to provide new certificated service between Buffalo and Florida, the Civil Aeronautics Board found, *inter alia:* that the Cleveland-Florida and Pittsburgh-Florida markets were among the top ranked non-competitive markets in the country (J.A. 905a, 1337a);[7] that Petitioner's monopoly service in these markets was insufficient to meet the needs of the traveling public (J.A. 901a-902a, 1337a); that there was a need for new and improved air transportation between a number of cities in the Buffalo-Cleveland-Pittsburgh triangle and Florida (J.A. 901a-907a, 1337a); that the markets in question could support new and additional competitive service (J.A. 905a-907a, 1337a, 1490a-1493a); that there was a need for competition with Petitioner in this area and a need for a better competitive balance between Petitioner and Capital Airlines (J.A. 901a-907a, 922a-924a, 1337a, 1342a); that Capital Airlines had the greatest historic interest in the traffic and the greatest identity in the markets to be served (J.A. 922a-924a, 1338a, 1486a-1488a); that the selection of Capital Airlines would convenience a substantial volume of passengers with required new and improved air service (J.A. 924a-925a, 1338a-1340a); that the selection of another carrier would have a serious adverse effect upon Capital Airlines (J.A.

[7] Reference to pp. 592a through 974a of the Joint Appendix is to findings of the Hearing Examiner which were adopted by the Civil Aeronautics Board. See J.A. 1320a.

15230a, 1487a-1488a); that the award would benefit Capital Airlines and provide it with needed route strengthening (J.A. 1342a, 1487a); that there would be no serious injury to Petitioner or other carriers as a result of the award to Capital Airlines (J.A. 925a-932a, 1488a, 1490a-1493a); and that Capital Airlines was fit, willing and able to provide the new services authorized (J.A. 1340a-1343a, 1488a-1490a).

These findings include many proper elements of "public convenience and necessity" and are more than sufficient to support an award pursuant to section 401 of the Act (52 Stat. 987, 49 U.S.C. § 481). Each is supported by substantial evidence. Although Petitioner has couched its issue on the adequacy of findings and the sufficiency of the evidence in terms of broad principles and has requested this Court to define the requirements of lawful findings on the elements of "public convenience and necessity," the factual question actually raised is uniquely narrow. The Petitioner contends that the Civil Aeronautics Board failed to make findings on the actual dollar cost which would be incurred by the carriers in operating the new competitive services authorized. The Petitioner alleges that the failure to make this one determination in the precise manner suggested renders the awards invalid for lack of supporting findings notwithstanding the many findings on other elements of public convenience and necessity.

Clearly the Petitioner's basic premise is incorrect. A finding on the exact dollar cost of a proposed competitive operation is neither required nor a controlling element of "public convenience and necessity" for an award under section 401 of the Act. In *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86 (1953) at 97, this Court held:

> "In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if there is a

> demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles 'by specialization, by insight gained through experience, and by more flexible procedure.' • • • In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast • • •."

In *American Airlines* v. *Civil Aeronautics Board*, 192 F.2d 417, 420-421 (D.C. Cir. 1951), the Court held that precise dollar estimates as to actual traffic potential and possible diversion under a new award are not required. See also *Lake Central Airlines* v. *Civil Aeronautics Board*, 239 F.2d 46, 49 (D.C. Cir. 1956). The Board's findings on this issue more than meet the standards established by this Court.

The possible traffic and revenue diversion from Petitioner as a result of the award to Capital Airlines was fully covered by the Hearing Examiner in his Initial Decision and was found not to be excessive in view of the important benefits which are provided the traveling public. The Examiner properly found that diversion will be largely offset by the new traffic generated by Capital Airlines and the fantastic traffic growth of the markets involved (J.A. 924a-932a).

The Board adopted most of the Hearing Examiner's findings, and it further found that Petitioner obtained 321 million revenue passenger miles and received 18 million dollars in revenue in 1956 from the routes over which Capital Airlines is authorized to compete. Assuming Capital Airlines' newly authorized service had been installed during 1958, the Civil Aeronautics Board estimated that Petitioner would have nevertheless obtained 10 million more revenue passenger miles than it did in 1956 and would have received 500 thousand dollars more revenue

than it did in 1956. (J.A. 1491a.) Further, the Civil Aeronautics Board pointed out:

> "The diversion estimate is also subject to downward adjustment because the traffic estimate used in the table above does not include the growth over and above normal growth which we would expect in those markets which Eastern (Petitioner) has been serving as a monopoly carrier. Thus, as to Capital's new authorization, 69 percent of the total passenger revenue included in the table is, by Eastern's (Petitioner's) own figure, derived from monopoly markets. • • • Thus, we believe the actual dollar diversion which Eastern (Petitioner) will experience will be offset by the added growth due to the spur of competitive service in these markets in which Eastern (Petitioner) will share." (J.A. 1492a-1493a.)

The Civil Aeronautics Board has thus fully considered the matter of diversion from Petitioner. It concluded on the basis of adequate findings and evidence "that Eastern's financial position will not be seriously affected by • • • [the Board's] awards in this case." (J.A. 1490a.) Upon judicial review the Court below stated:

> "We have examined the Board's findings on size of market and diversion and have found these findings adequately stated and supported by substantial evidence." (Petition, App. B, p. B10.)

The Court below was clearly correct in its determination that the Board's public announcement of its tentative vote upon the major issues of this case was not a decision and did not constitute a prejudgment of the case or otherwise prejudice the Petitioner. The cases cited by the Petitioner in support of its contention are clearly inapplicable. *Gilligan Will & Co.* v. *Securities and Exchange Commission*, 257 F.2d 461 (2d Cir. 1959), concerns the Commission's issuance of a press release accusing a person of violating the Securities Act only three days after it commenced a violation proceeding against him and prior to any hearing. *United States* v. *Forness*, 125 F.2d 928 (2d Cir. 1942), *cert.*

denied, 316 U.S. 694 (1942), involves the mechanical adoption of defendant's proposed findings by the Court in its final decision with the result that the findings were not supported by the evidence and were not in substantial accord with the opinion. Both of these cases turned on issues and facts not present in this case. Here the Civil Aeronautics Board merely announced publicly its tentative vote on the issues two months after all procedural steps had been completed and the case had been submitted for decision. The press release expressly stated that the announcement did not constitute the decision.

Petitioner contends that notwithstanding the advisory nature of the press release its issuance tends to solidify the Civil Aeronautics Board's decision because of the reluctance of members to change their publicly announced position and thereby pre-judges the case. That there is no substance to this contention is demonstrated in this very case. As pointed out by Petitioner itself (Petition, p. 23), the actual decision of the Board contained references to current data of record which were not available to the Civil Aeronautics Board at the time of the prior press release. Far from indicating improper procedure, as urged by Petitioner, this practice indicates full and fair consideration of all facts of record up to the time of the actual decision. It shows that the Civil Aeronautics Board did not regard its press release as the decision, but instead regarded it as a report of a tentative vote which was subject to further deliberation and to change, if need be, as the facts might warrant.

Furthermore, the tentative vote announced by press release is *actually changed* on occasion by the subsequent decision of the Board. Such change occured in the present case. For example, the press release announced that Capital Airlines' new Great Lakes-Florida route "would be restricted from providing single-plane service from *any of the cities on its system west of Cleveland*—such as Detroit, Chicago, Milwaukee or the Twin Cities—to any points

south of Atlanta." (J.A. 1228a-1280a; underscoring added.) But the subsequent decision of the Civil Aeronautics Board modified the announcement of the press release by finding:

> "As discussed more fully below, we will not permit Capital to provide single-plane service to Florida from such points as Detroit, Toledo, Chicago, Milwaukee and the Twin Cities in competition with other new services we are authorizing herein. *However, Capital will be able to provide its other Michigan cities, such as Flint, Lansing and Grand Rapids with first single-carrier single-plane service to Florida via a stop at such route junction points as Cleveland or Pittsburgh.*" (J.A. 1339a, underscoring added.)

Other instances where the tentative vote announced by press release were actually changed upon decision in this case are contained in Capital Airlines' brief in reply to Petitioner's petition for rehearing filed in the Court below and which has been certified as part of the record herein.

It is clear that the Board's press release did not constitute the final decision in this case. Issuance of the press release obviously did not preclude full and fair consideration by the Civil Aeronautics Board of its actual final decision. That decision was arrived at only after several careful reconsiderations of the detailed original decision. The tentative vote which had been announced by the press release was expressly subject to change—and was actually changed—by the Board's original decision and later on several occasions by the decisions on reconsideration.

The practice of announcing its tentative vote on major issues was adopted by the Civil Aeronautics Board to forestall such information being used for personal advantage by a limited number of individuals to whom such information has been "leaked" in the past. See *New York-Florida Case*, Order No. E-10884, pp. 16-17, December 21, 1956. The practice has in no way altered the decision making process, nor has it in any way prejudiced the Petitioner. The Court below so held. (Petition, App. B, p. B7.)

The Civil Aeronautics Board's finding that Capital Airlines is "fit, willing and able" was based upon voluminous evidence of record and was not predicated upon information received as a result of the alleged *ex parte* communications. The Court's decision below that such information was relevant to functions unconnected with the pending case is clearly correct.

In ruling upon the issue of Capital Airlines' fitness, willingness and ability in its original opinion below, the Board found *inter alia:*

> "We have little doubt but that an established trunk carrier, such as Capital, permanently licensed to operate regulated air transportation service in major traffic markets, is fit, willing and able within the meaning of the Act, and that it will be able to expand its base of operations to the extent necessary to accommodate the needs of the new markets certificated herein. The history of the growth and development of the trunk carrier industry gives ample evidence of this fact." (J.A. 1343a.)
>
> "As to the question of equipment, Capital tried its case on the basis of utilizing Constellation and Viscount aircraft it presently owns, a plan which we have reviewed and which we believe is at least adequate for purposes of resolving the issues before us. We have no doubt that with the important markets being made available to the carrier by our extensions herein, Capital will be able to acquire such additional aircraft as may be needed in the future to satisfy the needs of traffic growth." (J.A. 1342a.)

In its opinion on reconsideration the Civil Aeronautics Board stated with reference to petitioner's contention that Capital Airlines made *ex parte* representations concerning its equipment program, as follows:

> "We considered Capital's fitness and its new service proposals in this case on the basis of the carrier's own presentation of record and on the basis of equipment presently owned and operated, as is clearly indicated at page 25 of our prior Opinion. No new Capital

equipment arrangement was before us in this case and our deliberations were guided only by the record evidence. (footnote omitted)

"It is true that word of a Capital equipment acquisition arrangement came to us prior to our decision in this case. * * *.

"Even though we were aware of the Capital-General Dynamics negotiations from trade press reports and from the exchange of correspondence referred to above, this factor, not of record in this case, did not affect our decision in any way. As was made abundantly clear in our Opinion, the selection of Capital to operate the new Buffalo-Miami route was based on factors in favor of its selection which outweighed to a considerable degree the claims of other carriers to the route." (J.A. 1489a-1490a.)

There is absolutely no controversy as to the extent and nature of the alleged *ex parte* communications which were fully set forth in the Civil Aeronautics Board's opinion as follows:

"We received a teletype message from General Dynamics Corporation stating that it had entered into an agreement with Capital covering the sale of 15 Convair 880 aircraft and undertaking, on notice from Capital, to arrange for leasing to Capital of up to ten 1049H Constellation aircraft pending delivery of the 880's. (J.A. 1498a) By letter of February 12, 1958, the Board asked Capital to submit a copy of the agreement to the Board since it raised a question as to the existence of the section 408 control relationship between Capital and General Dynamics. (J.A. 1499a.) By letter of February 14, 1958, Capital submitted a copy of the agreement to the Board. Since the agreement was not final and the undertakings of the parties were not definite, the Board informed Capital, by letter of March 7, 1958, that a determination whether section 408 was or was not involved could not be made. (J.A. 1500a.) It was therefore suggested that Capital and General Dynamics consult the staff when the arrangement had been finalized to consider whether the Act requires the filing of an application and

prior approval of the arrangement by the Board before its terms could become effective. Board records do not indicate that such contacts with the staff have been made or that a final agreement has been filed." (J.A. 1489a-1490a.)

Capital Airlines and every other major carrier is constantly involved in many cases before the Civil Aeronautics Board. If Petitioner's contention were accepted, there could be no disclosure of carriers' equipment programs without involvement in improper *ex parte* representations as to some pending proceeding. To say that the Civil Aeronautics Board is precluded from receiving information on the equipment program of air carriers when such carriers have pending before the Board adversary licensing proceedings is tantamount to saying that the Board is foreclosed from performing its statutory obligation to regulate these carriers. See *FTC* v. *Waltham Watch Co.*, 27 U.S.L. Week 2365 (U.S.D.C., S.D.N.Y., Jan. 13, 1959.)

The Civil Aeronautics Board's powers and duties under the Federal Aviation Act of 1958 are broad and diverse. They touch every vital part of an air carrier's practices. Pursuant to its manifold duties and responsibilities under the comprehensive regulatory statute, the Board or its staff are in daily contact with the regulated carriers and there is a constant exchange of information entirely apart from any pending licensing proceeding. The telegram sent to the Board was an entirely appropriate method of advising the Board of matters which might raise questions of possible control under section 408 of the Act.[5] Such questions are entirely separate and distinct from the route proceeding below. Subsequent to the receipt of the tele-

[5] In fact the Civil Aeronautics Board has recently adopted a regulation which requires carriers to file details of their new equipment commitments as part of their routine reports. Amendment No. 9 to Part 241 of the Economic Regulations, 24 F.R. 3869, June 13, 1959. (See App. A.)

gram, the Board, by letter dated February 12, 1958, did inquire into the question of possible control under section 408 and requested a copy of the agreement pursuant to its authority under section 407(e) of the Act.

As is apparent from the telegram and the letter inquiries by the Civil Aeronautics Board prompted thereby, *there was no reference to the proceeding below and no indication that the information supplied by Capital should be considered in connection with the proceeding below.* Pursuant to the Board's request, by letter of February 14, 1958, Capital Airlines supplied the Board with a copy of the agreement with General Dynamics. By subsequent letter to the Board dated February 19, 1958, Capital advised the Board that it need not hold the agreement in confidence. Therefore, insofar as Capital and General Dynamics were and are concerned, a copy of the original letter agreement is on file with the Board pursuant to section 407, and the Board may release the agreement to the public if it so desires. (J.A. 1301a-1304a.)

As the Court below correctly held, "the communication to the Board * * * was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service Case.* * * * There is no indication that Capital made any covert communication to members of the Board and hence the recent case of *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958), is inapposite." (Petition, App. B, p. B9.)

Petitioner concedes that Capital Airlines was not guilty of the improprieties shown in the *WKAT* case but it contends that all *ex parte* communications are improper and must be considered in connection with an applicant's fitness. Petitioner suggests that this Court require administrative bodies to hold hearings as to an applicant's fitness every time an allegation of *ex parte* representations is raised no matter how frivolous. (Petition, p. 36.) What the Petitioner fails to understand is that the communications between Capital Airlines and the Civil Aeronautics Board were not in violation of the Board's rules and were

not *ex parte* within the meaning of the term as used by Petitioner. Further, the complete facts concerning the nature and extent of the communications are known to all parties and uncontested; the Board directed itself to the only issue which Petitioner contends has remained unresolved and held:

> "We have considered Eastern's contentions but cannot conclude that Capital's conduct in regard to this matter renders it unfit to receive the Buffalo-Miami award." (J.A. 1490a, fn. 26a.)

III

THERE IS NO CONFLICT OF DECISION

Only with regard to two of the questions presented has the Petitioner contended that the decision of the Court below is in conflict with decisions in another circuit. In neither case is there any conflict in application of legal principles or statutory interpretation. In each case the courts have applied the same legal principles, and the decision in each turns on its own individual facts.

The first alleged conflict is between the decision below (Petition, App. B) on the application of the *Ashbacker* doctrine and the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines* v. *Civil Aeronautics Board* (Petition, App. C). Petitioner contends that in the latter case the District of Columbia Circuit ruled that where a party had made a *prima facie* showing of mutual exclusivity, the *Ashbacker* doctrine applied, and under such circumstances the Civil Aeronautics Board was required to make specific findings on mutual exclusivity pursuant to the principles of *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F.2d 17 (1955). (Petition, p. 21.) In the case below, the Court held that Petitioner's failure to make any showing of mutual exclusivity was fatal to its *Ashbacker* contentions pursuant to the principles of *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F.2d 17 (1955) (Petition, App. B, pp. B6-B7). Thus, it is apparent that

there is no conflict between the two circuits. Both applied the same principles as enunciated in the *Delta Air Lines* case, *supra*. In the District of Columbia Circuit case, there was a *prima facie* showing of mutual exclusivity; in the case below there was no evidence presented on the issue of mutual exclusivity. Both circuits are in accord on the *Ashbacker* principles. The different result obtained by each of the courts was the result of a different factual situation.

Further, the Civil Aeronautics Board did rule on Petitioners's *Ashbacker* contentions notwithstanding its failure to present evidence in support thereof, and the Board found:

> "That consideration convinces us that the grant of Chicago-Atlanta-Tampa/St. Petersburg/Clearwater-Miami authority to Northwest will not preclude a subsequent grant of Eastern's application for an extension of its routes west from Chicago to the Pacific Northwest." (J.A. 1482a-1483a.)

The second alleged conflict is between the decision below (Petition, App. B) on the issue of *ex parte* representations and the decisions of the Court of Appeals for the District of Columbia Circuit in *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959), and *WKAT* v. *Federal Communications Commission*, 258 F.2d 418 (D.C. Cir. 1958). The most summary reading of the cases will show that the factual situations are completely dissimilar, and the dissimilarities are the sole basis for the different results.

The *WKAT* case involved applications for television construction permits. An award was made, and appeals were taken to the Court of Appeals for the District of Columbia Circuit. The Federal Communications Commission itself made a motion to remand the case to the Commission, alleging that since the filing of the appeals public charges had been made in the course of a Congressional

investigation; that one of the Commissioners who had participated in the proceeding before the Commission, but who had since resigned, should have disqualified himself. The Court of Appeals held that the cases should be remanded to the Commission. The Court below considered the *WKAT* case and correctly held it to be inapposite.

Not only are the extent and nature of communications between Capital Airlines and the Civil Aeronautics Board completely different from those involved in the *WKAT* case, but in the latter case the Commission itself moved to remand the case. In the present case, the Civil Aeronautics Board has clearly stated that its decision was not influenced and that Capital's conduct did not render it unfit. This in itself completely distinguishes the two cases. See *Federal Communications Commission* v. *WOKO*, 329 U.S. 229 (1946).

The *Sangamon Valley* case was very similar to the *WKAT* case. It involved numerous covert *ex parte* representations to members of the Commission directed solely to the issues in a pending proceeding in flagrant disregard of the agency's rules. The case concerned the reallocation of television channels by the Federal Communications Commission pursuant to a rule-making proceeding. Intervenor, Signal Hill Telecasting Corporation, and principal beneficiary of the subsequent reallocation of Channel 2 from Springfield, Ill., to St. Louis, Mo., through its president, spoke to each of the Commission members individually and in the privacy of their offices while the proceeding was pending of its desire to have Channel 2. Seven weeks after the cut-off date for filing reply comments, Signal Hill Television sent each Commissioner a private letter in which it contended and tried to prove that Channel 2, if based in St. Louis, would reach 166,700 more homes in the State of Illinois than if it were based in Springfield, Illinois.

Thus, it is clear that the *Sangamon Valley* case involved covert *ex parte* representations concerned with and directed to a specific contested proceeding pending before the Commission. The *ex parte* communications were not received by the Commission pursuant to its other unconnected regulatory functions. They related solely and exclusively to the pending proceeding.

The present situation is very different. The single telegram and the correspondence prompted thereby of which Petitioner complains gave information relevant to Civil Aeronautics Board functions unconnected with the route proceeding below. None of the communications makes reference, either actual or implied, to the issues of any pending proceeding. Hence, the rationale of the *Sangamon Valley* case is clearly not applicable here. As held by the Court below, the controlling rationale is contained in *Van Curler Broadcasting Corp.* v. *United States*, 236 F.2d 727 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 935. The Court in the *Sangamon Valley* case was careful to point out that its decision was not contrary to the *Van Curler* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 13, 1960

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Civil Aeronautics Act of 1938, 52 Stat. 977ff; 49 U.S.C. §§ 401-722

ACCOUNTS, RECORDS AND REPORTS

Inspection of Accounts and Property

"Section 407(e) The Board shall at all times have access to all lands, buildings, and equipment of any carrier and to all accounts, records, and memoranda, including all documents, papers, and correspondence, now or hereafter existing, and kept or required to be kept by air carriers; and it may employ special agents or auditors who shall have authority under the orders of the Board to inspect and examine any and all such lands, buildings, equipment, accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this Act, to persons having control over any air carrier, or affiliated with any air carrier within the meaning of section 5 (8) of the Interstate Commerce Act, as amended." [52 Stat. 1000; 49 U.S.C. § 487(c).]

CONSOLIDATIONS, MERGERS, AND ACQUISITION OF CONTROL

Acts Prohibited

"Section 408(a) It shall be unlawful unless approved by order of the Board as provided in this section—

* * *

"(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

* * *

"(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person

engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * *

Power of Board

"(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use air-

craft to public advantage in its operation and will not restrain competition."

* * *

Jurisdiction of Accounts of Noncarriers

"(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this Act, be subject, in the same manner as if such person were an air carrier, to the provisions of this Act relating to accounts, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof."

Investigation of Violations

"(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this Act, as may be necessary, in the opinion of the Board, to prevent further violation of such provision."
[52 Stat. 1001; 49 U.S.C. § 488]

Civil Aeronautics Board Economic Regulations
(14 CFR Part 241)

SCHEDULE B-2 — NOTES TO BALANCE SHEET

(c) The amounts and estimated delivery dates of any purchase commitments of material size and not of a recurrent routine character shall be explained on this schedule. In the case of commitments involving flight equipment, the amount for each equipment type may be given in total, including any engines, airframes and the number of engines by type shall be given for each complete aircraft. Reports on commitments other than for flight equipment are required only in the December 31 report of each calendar year (24 F.R. 3020, June 13, 1959).

Proof of Service

I, James H. Bastian, one of the attorneys for Capital Airlines, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of April, 1960, I served copies of the foregoing Motion of Capital Airlines, Inc., and Brief in Opposition, on the parties as follows:

1. On the United States by mailing copies in duly addressed envelopes, with first class postage prepaid, to the Honorable J. Lee Rankin, Esq., Solicitor General for the United States, to Victor R. Hansen, Esq., Assistant Attorney General and to Richard A. Solomon, Esq., At, torney, all of the Department of Justice at Washington 25, D. C.

2. On Respondent, Civil Aeronautics Board, by mailing copies in duly addressed envolepes, with first class postage prepaid, to Franklin M. Stone, Esq., General Counsel of the Civil Aeronautics Board, to John H. Wanner, Esq., Associate General Counsel, to O. D. Ozment, Esq., Assistant General Counsel, and to Morris Chertkov, Esq., Attorney, all with the Civil Aeronautics Board at Washington 25, D. C.

3. On Petitioner, Eastern Air Lines, Inc., by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to E. Smythe Gambrell, Esq., W. Glen Harlan, Esq., Harold L. Russell, Esq., Attorneys for Eastern Air Lines, Inc., 825 Citizens and Southern National Bank Building, Atlanta, Georgia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 785

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

BRIEF OF DELTA AIR LINES, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Delta Air Lines, Inc. ("Delta"), an Intervenor below on the side of Respondent, the Civil Aeronautics Board (the "Board" or the "CAB") prays that insofar as Questions One and Three are concerned, this Court will deny the Petition for Writ of Certiorari filed in No. 785 by Eastern Air Lines, Inc. ("Eastern"). The Petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on October 7, 1959, rehearing denied December 15, 1959.[1]

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[1] Citations to the Opinion below will be to Appendix B of the Petition in No. 785, *e.g.*, "(B7)". References to material in the printed Joint Appendix will be by page number thereof, *e.g.*, "(J.A. 123)".

INTRODUCTORY STATEMENT

The Petition presents four questions for possible review by this Court. Only Questions One and Three affect Delta, and this Reply Brief, therefore, will discuss only those matters presented by the Petition in support of those two questions. Delta expresses no opinion as to whether the Court in this case should review the matters presented by Question Four[1] except that if a Writ of Certiorari is issued concerning the latter matter, to request that review be limited strictly to that Question.

ARGUMENT

I.

The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number One

Question No. 1, as stated by Eastern:

> May the Board, required by statute (Civil Aeronautics Act of 1938 § 1005(f), 49 U.S.C. § 645(f); Administrative Procedure Act §§ 8(b), 10(e), 5 U.S.C. §§ 1007(b), 1009(e)) to make adequate findings on the elements of public convenience and necessity before certificating a new air service (Civil Aeronautics Act of 1938 §§ 2, 401(d), 49 U.S.C. §§ 402, 481(d)) lawfully certificate a new service in a given market but refuse to make findings measuring the expectable revenues or volume of traffic against expectable costs of operation and capacity in the market?

The precise reasons why Eastern feels that this Court should review the matters raised by Question One are not clear. Eastern does not allege that there is any conflict between decisions of the United States

[1] Many of the matters raised in Question Two are also raised by Eastern, in much the same form, in its Petition in No. 777. In that case, these matters are of immediate concern to Delta, and Delta has responded to them in its Reply Brief in No. 777.

Courts of Appeal or of any other Courts with respect to this question.[1] Nor are any other of the illustrative reasons which are set forth in this Court's Rule 19 specifically mentioned by Eastern.

Eastern, however, does try to create the illusion that there is involved here an important question of federal law which has not been, but should be, settled by this Court (Rule 19[b]). Basically, the contention is that the Second Circuit has sustained an opinion of the CAB under Section 401 of the Civil Aeronautics Act[2] although the agency opinion in one aspect is not supported by findings of a type which Eastern believes should be required under that section of the statute.

But there actually is no important question open for settlement by this Court. Eastern's own attempt to justify the requested review makes this fact clear.

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[1] In passing, Eastern (Petition, pp. 13-16) mentions that the growth and development of the airline industry "has been marked by varying and inconsistent interpretations" of the statutory section involved, "and a noticeable lack of uniform application of the interpretations placed on it by the Board," and that the matters concerning which Eastern seeks review are "increasingly involved before the Board, and the Courts of Appeal, and with increasing inconsistency of treatment." But these general statements are nowhere supported in the Petition by even a single reference to "inconsistent" court decisions concerning these matters. Eastern also implies (Petition, p. 15) that the approach of the Court below was "divergent" from the approach of the District of Columbia Circuit in a related case, and further alleges, "in at least one instance, in direct conflict." Eastern's own Petition shows, however, that the only instance of actual conflict even alleged to exist concerns Question Two of the instant Petition, not Question One, or Questions Three or Four. Nor is any alleged "divergency" with respect to Question One ever explained.

[2] 49 U.S.C. 481 (now Section 401 of the Federal Aviation Act of 1958, 49 U.S.C. 1371), set forth in Appendix A of the Petition in No. 785, pp. A6-A8.

First, Eastern relies on the mere statement that neither this nor any other Court ever has "definitively interpreted" Section 401 (Petition, pp. 13 and 16). Standing alone, of course, the statement—whether true or false—cannot justify burdening this Court with review of the Second Circuit's decision. The Court cannot be expected to "definitively interpret" a statutory provision unless an overriding question of public interest, and not just Eastern's own interest, is involved. As the Court said in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants . . ."

Furthermore, Eastern's allegation in any event is incorrect. As the cases cited in the margin[1] establish,

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[1] In addition to the many cases concerning completed or intended CAB action under Section 401 in relation to this Court's Ashbacker doctrine (*Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327 [1945]), cited at p. 20 of the Petition, cases construing Section 401 include the following: *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572 (1950) (sustaining CAB award of route to a carrier that had not even applied for the specific route and therefore had made no detailed proposal regarding its operation); *United Air Lines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1946), 155 F. 2d 169 (approving Board findings on profit potential and possible diversion, although the findings were in general terms, not expressed in dollar amounts, and stating, "It could not be said that such a forecast in general terms is fatally defective merely because no one could predict with precision the probable net revenue in dollar amounts"); *American Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1951), 192 F. 2d 417 (discussing the type of finding needed to justify a certification under Section 401); *Continental Southern Lines* v.

Section 401 *has* been interpreted by this and other Courts on a number of occasions, so that there is an established judicial interpretation as to the type of findings necessary to support a certification under the section.[1]

Next, Eastern tries to lend substance to the alleged need for a "definitive interpretation" of the statute by implying that without such a new definition, despite the many agency and the Court decisions which have been rendered under Section 401 (the Act was passed in 1938), the content and meaning of the "public convenience and necessity" standard of that section will

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Civil Aeronautics Board (D.C. Cir. 1952), 197 F. 2d 397, *cert. den.* 344 U.S. 831 (emphasizing the criteria of the Act which the Board must consider in determining the "public convenience and necessity"); *North American Airlines* v. *Civil Aeronautics Board* (D.C. Cir. 1956), 237 F. 2d 209 (upholding CAB denial of application under Section 401 as not required by "public convenience and necessity"); *Frontier Airlines, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1958), 259 F. 2d 807 (approving the use of so-called "beyond area" data in determining "public convenience and necessity"); *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (D.C. Cir. 1960), ... F. 2d ....., 6 Avi. 17,894 (upholding CAB route certification to a carrier which had made no detailed proposal regarding its operation, and approving general finding that the benefits of authorization "will outweigh any adverse effects on Braniff that are likely to result").

[1] Furthermore, the "public convenience and necessity" standard is not unique to airline law, but also is found in such Federal Statutes as the *Motor Carrier Act*, 49 U.S.C. 301, *et seq.* and the *Water Carrier Act*, 49 U.S.C. 901, *et seq.*, and in numerous state statutes. Court decisions under such statutes—particularly the Motor Carrier Act—are numerous and are helpful in determining the Congressional intent in Section 401 of the Civil Aeronautics Act. As the Board has declared, the Civil Aeronautics Act was patterned upon the Motor Carrier Act, and the aviation statute therefore ". . . should have like interpretation application and effect" *Acquisition of Marquette by TWA*, Supplemental Opinion, 2 C.A.B. 409, 412 (1940).

be in doubt (Petition, pp. 13-14). This is a strange argument to be raised by Eastern at this time and in this case, because *Eastern itself told the Court below that the elements of "public convenience and necessity" under Section 401 are clear and definite,* and three in number. We quote from Eastern's Brief to that Court, page 43:

> "A contemporaneous construction given to that language [Section 401(d)] by the Board in *United Air Lines, Red Bluff Operations,* 1 C.A.A. 778, 779-80 (1940) *resolved the basic elements of public convenience and necessity germane to proceedings such as this* into the following queries:
>
> (1) whether the new service will serve a useful public purpose, responsive to a public need; and
>
> (2) whether this purpose can and will be served as well by existing lines or carriers; and
>
> (3) whether it can be served by the applicant with the new service without impairing the operations of existing carriers contrary to the public interest.
>
> *"The basic elements of public convenience and necessity are the same today as they were in 1940. Their strength has not been vitiated by any decision of the Board nor any Act of Congress"* (Footnotes omitted; Emphasis Added).

Eastern's contention below was that in granting the applications of which Eastern complains, the Board did not make sufficient findings to support its implicit, affirmative answers to each of those three, clear questions. Eastern did not contend below as it does now, that the history of Section 401 has been marked "by varying and inconsistent interpretations," or by "a noticeable lack of uniform application" (Petition,

p. 13), resulting in "confusion" as to its requirements (Petition, p. 14). The meaning of that Section was taken as settled by Eastern at earlier stages of this appeal.

Where, then, is the important public question which this Court is supposed to settle? Eastern makes one other attempt to create the illusion of such a question, in its request that this Court interpret the term, "public convenience and necessity" as used in Section 401, to require a specific finding in each case weighing the size of a market against the capacity to be offered by all carriers, and the cost to all of serving it (Petition, pp. 16-17). In this respect Eastern is not seeking a determination of the elements of "public convenience and necessity," but only a rule dictating a fact-finding method to be used in determining whether or not those elements exist in a particular case.

As Eastern admits (Petition, p. 12), *this* argument *was* made to the Court below. Eastern now says that the Court did not rule upon it (*ibid.*), but Eastern is wrong. The argument was presented below in support of Eastern's contention that the Board had not made adequate findings concerning the last of the three ultimate questions which Eastern, in the above quotation, said the Board had to answer in a Section 401 proceeding (which question Eastern described as whether a useful public purpose can be served by the applicant "without impairing the operations of existing carriers contrary to the public interest"). The Second Circuit *did* rule on this contention, specifically finding that the Board had determined that existing services were inadequate so that the new services were needed, and that the "Board's findings on size of market and diversion . . . [were] . . . adequately stated

and supported by substantial evidence" (B9-B10). The Court also found that Eastern, as the existing carrier, had not sustained its own burden to show the diversion which it might suffer (B10, footnote 15).

The fact that the Court below did not require a specific relation of traffic to expenses as requested by Eastern may be taken as a deliberate decision that such a relation is not necessary in order to determine whether an existing carrier will be impaired "contrary to the public interest" where, as here, there *are* ample findings as to the expectable size of the market and the diversion, if any, which the existing carrier might suffer. That such a decision was intended by the Court is clear from the fact that Eastern's Petition for Rehearing, which specifically requested a ruling that such a traffic/expense relation is necessary, was denied without further opinion.

The Court below, therefore, approved the method used by the Board to determine the possible impact of the new services on Eastern (*i.e.,* the Board's measurement of the likely diversion, if any, which Eastern might suffer, in relation to the Board's measurement of the expectable traffic market and Eastern's likely future share), finding the Board's decision well stated and amply supported, and refused to require use of Eastern's suggested, alternative method of specifically relating Eastern's expectable future traffic against an estimate of the costs which Eastern might incur in serving that traffic.

This refusal by the Court below to enforce use of Eastern's method is reasonable, because Eastern's future expenses are a matter largely within Eastern's control and thus not susceptible to accurate forecast. As the Board pointed out in this very case, the regu-

lated air carriers have the power, and indeed, the duty, to adjust their operations (which determine their expenses) in relation to the amount of competition which the Board finds necessary in a particular market to serve fully the public interest (Order E-13024, J.A. 1334-1336).

In *United Air Lines* v. *Civil Aeronautics Board, supra,* a contention was made that the Board's decision was fatally defective because it contained no findings as to revenues to be derived and expenses to be incurred in the operation of a new route by the carrier which was certificated, Western Airlines. The kernel of the contention there was that the economic effect of Western's selection—a key reason for the decision—could not be told without a finding of Western's net revenue from the proposed new operations. In approving the Board's action, the District of Columbia Circuit noted that there was not even any evidence in the record as to such revenues and expenses, but found such dollar estimates unnecessary in any event. The Court noted that the factors from which the Board's conclusion in that case had to be fashioned were not dollar factors:

> "... In large part they are imponderables. The economic and competitive desirability of the maintenance of Western was not measurable in dollars. Neither was the contrary competing consideration, the convenience of a large portion of the traveling public. There is no formula for combining these elements into a conclusion. . ." (155 F. 2d 169, at 175).

Thus, rather than speculate as to what service Eastern actually might operate in the future, and therefore what its costs might be, the Board determined what

the size of markets should be and what share of those expectable markets Eastern should obtain in a future year if it operated a normal schedule pattern (J.A. 888-890; 899-901; 925-930; 1318-1319; 1326-1327; 1333-1334; 1472-1477; 1479-1481; 1490-1493). The Board found that despite the new services, Eastern would still realize *more* revenues from the routes, even in the first year of operation, than it did before the new services were authorized (J.A. 1481; 1490-1493). Thereafter, the Board further found, Eastern would share in the increased revenues to result from traffic growth and from expected market stimulation under the spur of new competition (J.A. 1492-1493). In addition, the Board found that Eastern would remain a dominant carrier along the routes involved (J.A. 1492). Thus, unless Eastern artificially inflates its own costs, its profit position should remain firm.

This was the procedure which the Court below found to be reasonable in refusing to enforce use of Eastern's alternative, more speculative method. And in this connection, it is well to recall the role of the Courts of Appeal in disposing of questions such as are here involved. As the District of Columbia Circuit said in *United Air Lines, Inc.* v. *Civil Aeronautics Board, supra:*

> "... The ascertainment of the facts in each particular phase of the problem and the application of the legislative mandate to the facts thus ascertained are functions susceptible of delegation by the legislature. The execution of the legislative mandate is, of course, a responsibility of the executive. In this development operation, the function of the judicial branch of government is inherently limited. The courts must make certain that the legislative enactment is within Constitutional limi-

> tations, that the executive program is within statutory limitations, and that a disputed executive action is within the terms of the legislative mandate, fairly based on facts fairly found, and not arbitrary, capricious or fanciful. Beyond this, in a national project of this sort, the courts cannot go" (155 F. 2d 169, at 171-172).

Eastern's contention under Question One thus boils down to this: Although the Court below *did* find that the Board used an intelligible, and adequately documented, method to determine the *undisputed* elements of "public convenience and necessity," and *did* fairly determine them upon facts fairly found, the Court should have required use of a *different method*—a different sort of subsidiary finding—to support that determination. Eastern is merely arguing, in other words, that the Court below was wrong in approving the fact-finding method actually utilized by the Board rather than requiring use of a method which Eastern thinks is better.

In so arguing, however, Eastern misconceives the purpose of the certiorari procedure. The power to review by writ of certiorari was not conferred upon this Court for purposes of merely correcting an opinion of a lower Court. Something more than that is needed. As this Court said in *Magnum Import Co.* v. *De Spoturno Coty,* 262 U.S. 159, 163 (1923):

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of

> last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ. . . ." (Emphasis added) [1]

It is clear from the foregoing that Question One presents no necessity for securing uniformity of decision between the Courts of Appeals, and does not attempt to bring to this Court a matter of importance which the public interest requires the Court to resolve. To the contrary, in this respect, Eastern is one of the 80 percent of petitioners for certiorari—a disappointed appellant, merely seeking another hearing.

Question One does not justify the issuance of a writ.

II.

The Petition Does Not Present Sufficient Reason for this Court To Review the Matters Raised by Question Number Three

Question No. 3, as stated by Eastern:

> Is it lawful for the Board, in airline "new route" proceedings, to announce its determinations, prior to consideration of all relevant and material portions of the record, by "press release," without supporting reasons or consideration of all pertinent and material fact?

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[1] Although the *Magnum* case was decided before the amendments made by the Judiciary Act of 1925, the force of the above-quoted language has not been vitiated. The essence of the Act of 1925 was curtailment of this Court's appellate jurisdiction as a measure necessary for the effective discharge of the Court's functions (*Ex Parte Republic of Peru*, 318 U.S. 578, 600 (1943)). Furthermore, the quoted language from *Magnum* has been cited with approval within just the past few years, *Rice* v. *Sioux City Memorial Park Cemetery, supra*, 349 U.S. at 74.

Question Three involves Eastern's contention, made to the Court below, that a press release issued by the Board some six months before its opinion, "fettered" the Board's "discretion and precluded any open-minded consideration of the facts in the preparation of its formal decision" (Petition, pp. 22 and 26-31).

Eastern's contention turns upon its belief that the press release actually was "a decision" (Petition, p. 30) and, in fact, was the final decision so that thereafter the Board could do nothing but rationalize conclusions previously reached (Petition, pp. 26-31).

The Second Circuit rejected these arguments. The Court had before it the same evidence upon which Eastern based its contentions, but the Court reached a different conclusion, namely, that the press release did not constitute a final decision (B6-B7). The Court pointed to the Board's language in the press release itself which stated that the release did not constitute a decision, but that the decision would be entered and issued later (*ibid.*). The Court said:

> ". . . We construe this language to mean that the announced awards did not constitute final determinations but were tentative only, and that there were to be no definitive awards until the issuance of the Board's formal opinion . . ." (B7).

Eastern, however, also relied on the fact that when finally issued, the awards made by the decision in this case coincided exactly with those announced in the previous press release, and claimed that this established that the decision represented nothing more than a formalization of conclusions previously reached. The Court also considered this evidence, and the other data

before it, and again reached a different conclusion than Eastern. It said:

> ". . . We only indicate that Eastern's claim of prejudgment is unsound. Eastern does not contend that the interval between the completion of oral argument and the Board's tentative decision was so short that it precluded thoughtful consideration of the evidence presented. Moreover, if the careful marshalling of facts required in drafting an opinion should have indicated that a different decision was proper, the tentative decision announced in the press release need not have prevented the Board from reaching a different decision. Hence we hold that the press release procedure did not deny Eastern a fair hearing" (B7).

What is involved, therefore, is a situation where the decision of the Court of Appeals turned upon its fair assessment of the evidence—an assessment which led it to different conclusions than those urged upon it by Eastern. Eastern is now asking this Court to again assess the record and disagree with the conclusions of the Court below. Even if it be assumed that the pertinent evidence is susceptible of differing interpretations, this Eastern request does not present a subject to which this Court's certiorari power properly attaches. As the Court said in *Federal Trade Commission* v. *American Tobacco Company,* 274 U.S. 543, 544 (1927), the "usual rule" which it follows is:

> ". . . non-interference where conclusions of circuit courts of appeals depend on appreciation of circumstances which admit of different interpretations . . ."

In that case proper decision of the controversy also depended upon a question of fact (as here: do the facts establish that the Board predetermined the case?)

and, although certiorari had been granted, the Court later determined that it should not interfere, and affirmed the judgment on the above-quoted ground alone. Also see *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 502-503 (1951).

Even if this Court in rare cases were inclined to reassess a record, there clearly is no basis for doing so here. In its attempt to persuade the Court otherwise, Eastern makes much of a contention that the Board issued its press release first and then, in reaching the actual decision during the next six months, utilized air traffic survey and financial data which was not in existence at the time of the press release (Petition, pp. 22 and 29). On the assumption that these data were essential to the Board's decision, Eastern feels that they could not fairly have been considered because the Board had already announced its "predetermination." Eastern concludes that the data were merely "used" to make the opinion conform with the press release announcement (Petition, pp. 22, 29 and 30).

This argument, too, was presented to the Court below, but it did not persuade that Court to infer the evils which Eastern infers from the facts. This Court should understand that the air traffic data used by the Board were available to it pursuant to a stipulation entered into by all parties, including Eastern (J.A. 195-196). This stipulation (set forth at J.A. 1506-08) specifically provided that such traffic and financial data should be incorporated into the record as it became available up until the time of the Board's *final* decision (stipulation, Nos. 6-10, J.A. 1507-08).

As the Court below found, the press release was far removed from the actual final decision in the proceed-

ing. Even the Board's September 30, 1958 decision (issued six months after the press release) was not the final decision. Until a certificate is issued *and made effective,* an airline route proceeding is not finalized. Once the certificate *is* made effective, the administrative proceeding *is* terminated and the last-previous decision can be considered the final one. But until that time, the Board is free—and has a duty—to consider and reconsider all data of record, and to issue and amend its decisions as it deems necessary.

This has clearly been recognized to be so under the Motor Carrier Act which, insofar as here pertinent, is similar in content and purpose to the Civil Aeronautics Act.[1] In *United States* v. *Rock Island Motor Transit Company,* 340 U.S. 419, 448 (1951), this Court said:

> "... the certificate is the final act or order that validates the operation. Until its form and content are fixed by delivery to the applicant, the power to frame it in accordance with statutory directions persists."

Both the *Rock Island Case* and *United States* v. *Seatrain Lines, Inc.,* 329 U.S. 424 (1947), cited with approval the following language of the ICC concerning certification processes:

> "*We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined,* but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. *All the antecedent decisions and orders are essentially procedural in*

[1] *Acquisition of Marquette by TWA,* 2 C.A.B. 409, 412 (1940) discussed *supra.*

> *character, and may be set aside, modified, or vacated,* but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding" (*Smith Brothers, Revocation of Certificate,* 33 M.C.C. 465 [1942]; emphasis added).

Thus, because no certificate had been put into effect (or even issued) when the press release was published, the release clearly was not a final determination in any sense and could be altered to the extent, if any, that the Board's further study of the record indicated was necessary. The above-mentioned stipulation continued in effect throughout the full period of decision and reconsideration.

When it issued its first actual decision (Order E-13024, of September 30, 1958, J.A. 1313 *et seq.*), the Board inserted provisions into the certificates thereby granted which clearly stated that even then, some six months after the press release, the certificates were not to become effective for a further period of sixty days (J.A. 1379, 1384, 1388, 1394, and 1400). The provisions were inserted in accordance with the Board's customary practice of affording a period of time for reconsideration of certificate-proceeding decisions, despite the lack of provision in the statute itself for such reconsideration (*Kansas City-Memphis-Florida Case,* 9 C.A.B. 401 [1948]). Furthermore, in each certificate the Board reserved a power unto itself to further extend those effective dates if additional time were needed for reconsideration (J.A., *op. cit., supra*). This, too, is a customary Board practice in certificate proceedings.

Under these circumstances, in conformity with the above-cited cases but contrary to Eastern's allegation,

neither the Board nor the industry consider even the first actual Board decision in a certificate case as necessarily the last decision. The industry well knows that a certificate initially issued may be changed on reconsideration before the certificate is made effective. After that effective date, the carriers are justified in believing that the administrative proceeding has been terminated, but prior to the effective date they could entertain such a belief and act thereon only at their peril. Clearly, then, because even the Board's first actual decision is not necessarily the final decision, the Board and the industry cannot and do not consider a mere prior press release of a tentative vote, stated on its face not even to be a decision, to be the Board's final determination in any manner.

The Board is well aware of its power and its duty to deviate from a press release announcement if its "careful marshaling of facts required in drafting an opinion should" thereafter indicate that a different decision is proper (B7). The Board publicly declared this power at the time it instituted the press release procedure in connection with its *New York-Florida Case*, C.A.B. Docket 3051 *et al.*, Order E-10884 (December 21, 1956), and has acted on the basis of its publication ever since. The Board stated that a press release is no more than a public statement of the tentative vote on a given case by a majority of the Board. The vote, the Board said, is no more final in a case in which a press release is issued than it is when a press release is not issued. A proposed decision, the Board continued:

> ". . . does not become effective until an opinion and order containing detailed findings of fact and conclusions of law has been approved, issued and served according to the Board's established pro-

> cedures. Until such time, each Member has retained full power to revise or reverse his vote and his findings on any of the matters under consideration . . ." (C.A.B. Order E-10884, *supra*, p. 17).

And even after that time, until a certificate is made effective, each member retains his right to reconsider his decision, as seen above.

Not only is the Board aware of its power and duty to deviate, but it actually does deviate, from a press release announcement in any way shown to be necessary by further study of the record. Thus, as the Court below was advised, in the Board's *Seven States Area Investigation,* C.A.B. Docket 7454 *et al.*, Order E-13254 (December 8, 1958) (a case of major proportions), the Board's decision differed markedly from its press release announcement—namely, (1) by certificating a route segment to a different carrier than announced in the press release, (2) by extending a route award to a different terminal than the one announced in the press release, and (3) by omitting *any* certification of a route announced in the press release.

Clearly, the inferences which the Court below drew from the record before it were reasonable and justified. This fact only reinforces the usual rule followed by this Court, of non-interference in a situation of this type.

Question Three does not justify review by this Court.

CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that a Writ of Certiorari should not issue with respect to Questions One and Three of the Petition for Certiorari in No. 785.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 785

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. B) is reported at 271 F. 2d 752. The opinions and orders of the Civil Aeronautics Board (J.A. 1313a–1400a, 1469a–1497a, 1509a–1536a) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1959, and a petition for rehearing was denied on December 15, 1959. The petition for a writ of certiorari was filed on March 14, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board made adequate findings in support of its conclusions that the public convenience and necessity required various services competitive with those of petitioner.

2. Whether the Board must consider a claim of mutual exclusivity between new route applications where the carrier urging exclusivity fails to avail itself of the opportunity expressly given it to support its claim in the hearing on the allegedly conflicting application.

3. Whether due process is denied an applicant in a comparative route proceeding by the issuance by the Board, prior to the preparation and entry of its final opinion and order, of a press release stating the Board's tentative vote.

4. Whether the submission to the Board of a telegram from an aircraft manufacturer, sent at an applicant's request, relating to the applicant's proposed acquisition of new equipment and relevant to other Board functions, required disqualification of the applicant, or a reopening of the Board's proceeding to determine whether the telegram represented an attempt to influence the Board by *ex parte* submissions.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Civil Aeronautics Act and the regulations of the Board thereunder are set forth in Appendix A to the petition.[1]

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[1] On December 31, 1958, after issuance of the Board's decision, the Civil Aeronautics Act was superseded by the Federal Aviation Act of 1958 (72 Stat. 731, 49 U.S.C. 1301, *et*

STATEMENT

The agency proceeding in issue here involved consideration of applications for new trunkline air route authority in the Civil Aeronautics Board's *Great Lakes-Southeast Service Case.* After hearing and full administrative proceedings, the Board, by decision of September 30, 1958 (J.A. 1375a), made awards (1) to Northwest Airlines for a route between Chicago and Miami, (2) to Delta Air Lines for a route between Detroit and Miami, and (3) to Capital Airlines for routes between Cleveland, Pittsburgh and Miami, and between Buffalo and Miami. The grants in each case were made over the opposition of petitioner, which was already authorized to operate over the first three of the above routes and was an unsuccessful applicant in the proceeding for the Buffalo-to-Miami route. The Court of Appeals for the Second Circuit affirmed (Pet. App. B 1–13).

1. In order to limit the proceeding to manageable proportions, the Board consolidated for hearing only those applications that related to the area bounded on the north by the cities of Chicago, Detroit and Buffalo, and on the west by Indianapolis, Ind., Louisville, Ky., and Atlanta, Ga. (J.A. 82a).[2] Prior to the hearing Eastern attempted to broaden the proceedings to include consideration of certain applications which it had filed for service to the west and northwest of Chicago into areas already served

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seq.). There were no substantive changes in the statutory provisions here pertinent.

[2] Reference to the printed Joint Appendix below are given as "J.A. ——."

by applicants for the Chicago-to-Miami route, including the successful applicant Northwest. Under established Board procedures, existing air carriers receiving new routes connecting with those they already have may, in the absence of contrary restrictions, combine the new authority with the old, and thus provide single carrier or single plane operation between cities already served by them outside the area to which the proceeding was limited and cities on the new routes.

Eastern already served the southeast cities sought by the applications that had been consolidated for hearing. It contended that, since traffic would move between cities outside the area of the proceeding and cities on any new routes such carriers would secure in the southeast, it was entitled under the *Ashbacker* principle [3] to have its applications to extend its service from the southeast into the areas already served by the applicants for Chicago-to-Miami authority consolidated into the proceeding for comparative hearing therein (J.A. 91a–105a). The Board denied this consolidation request on the ground that the proceeding would be unduly broadened to include "nearly every major traffic point in the country" (J.A. 118a). It took steps, however, to minimize the impact of any grants upon Eastern's applications by stating in advance that non-stop flights between cities on existing routes outside the area of the proceeding and cities on any of the southeast routes to be authorized would not be permitted (J.A. 83a, 89a–90a). It also pro-

[3] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

vided that the parties (including Eastern) would be entitled "to urge the mutual exclusivity of their respective proposals" in the course of the proceeding (J.A. 83a).[4]

Eastern did not introduce evidence in support of its claims of mutual exclusivity. Although the examiner specifically ruled that Eastern could explore the mutual exclusivity issue as a matter of economic fact (J.A. 176a–177a), Eastern took the position that the Board or the applicants with beyond-area routes were under a legal duty to rebut or disprove its bare assertions of conflict. In certificating Northwest, the Board rejected Eastern's contentions both on the grounds that exclusivity had not been established and that it did not exist (J.A. 1482a–1484a).[5]

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[4] Eastern unsuccessfully sought review of the Board's consolidation order. *Eastern Air Lines* v. *Civil Aeronautics Board*, 243 F. 2d 607. The Court dismissed the petition as one for review of an interlocutory order; it also indicated its disagreement with the theory upon which Eastern sought consolidation.

[5] The Board pointed out that the certification of Northwest would leave untouched numerous service needs which would be decisive of whether there should be additional operations between Chicago and the Pacific Northwest. Further, Eastern's principal contentions concerning Northwest's application were that Eastern would be precluded from an extension from Chicago to the Twin Cities. The Board pointed out that Eastern was in fact receiving comparative consideration in relation to the Chicago-Twin Cities route in another pending proceeding. In point of fact, the Board subsequently found a need for two additional carriers over this route, one unrestricted and one with certain conditions. See *Chicago-Milwaukee-Twin Cities* Case, C.A.B. Order No. E–13890, decided May 19, 1959. Eastern received the restricted award, but was afforded full comparative consideration for the unrestricted one.

2. Just prior to the oral argument before the Board on exceptions to the examiner's opinion, the Board received a telegram from the General Dynamics Corporation, manufacturer of Convair planes, advising the Board of a proposed equipment purchase by Capital Airlines, one of the applicants in the consolidated proceeding (J.A. 1498a). In its opinion on reconsideration (J.A. 1488a–1490a), the Board considered and rejected Eastern's argument that this telegram, which General Dynamics stated had been sent "at the suggestion of Capital" (J.A. 1498a), constituted an improper *ex parte* attempt by Capital to influence the Board's determinations. Pointing out that it had considered Capital's fitness to receive an award wholly on the basis of the record evidence, and that its knowledge of the Capital-General Dynamics negotiations, obtained from trade press reports as well as the telegram, had not affected its decision in any way, the Board held that it "cannot conclude that Capital's conduct in regard to this matter renders it unfit" to receive the routes awarded to it (J.A. 1490a, n. 26a). It pointed out that the Capital-General Dynamics negotiations had raised questions under Section 408 of the Civil Aeronautics Act as to the existence of a control relationship between those two parties, which had become the subject of correspondence with Capital and General Dynamics (J.A. 1499a–1500); and that the negotiations had also been the subject of testimony in the Board's then pending General Passenger Fare Investigation.

3. Approximately two months after the oral argument, but before the preparation and publication of its final opinion and order, the Board issued a press release announcing its tentative vote in the case (J.A. 1275a–1281a, 1495a). The issuance of such press releases in major proceedings, which are designed to prevent "leaks" to the public of the Board's tentative decisions, has been the agency's consistent practice since 1956.

4. The issues raised in Eastern's petition to review in the court of appeals included the four questions here presented. In rejecting these contentions and unanimously affirming the Board, the court held (1) that the Board's findings as to the adequacy of the size of the markets to support the additional competition certificated therein were "adequately stated and supported by substantial evidence" (Pet. App. B 10); (2) "that in an area proceeding where an applicant objects to the exclusion of his application by a consolidation order, and does not submit evidence [at the hearing] in support of his objection, the agency may treat the objection as not having been made" (Pet. App. B 6); (3) that Eastern had not been denied a fair hearing by the Board's making public its tentative decision, since it expressly did not preclude a changed vote if subsequent "marshaling of facts * * * indicated that a different decision was proper" (Pet. App. B 7); and (4) that the General Dynamics-Capital communication to the Board "was not improper, for such information was relevant to Board functions unconnected with the *Great Lakes-Southeast Service* case * * * [and] [t]here is no indi-

cation that Capital made any covert communications to members of the Board * * *" (Pet. App. B 9).[6]

ARGUMENT

1. The first three of the four grounds advanced by petitioner as warranting review are, as it states (Pet. 15), also presented in its petition for certiorari in No. 777, this Term, in which review is sought of the decision of the Court of Appeals for the District of Columbia Circuit in *Delta Air Lines* v. *Civil Aeronautics Board* (Pet. App. C). For the reasons set forth in the Board's Memorandum filed in that case, we think the court of appeals in the instant case correctly resolved each of these questions adversely to petitioner. Certiorari should therefore be denied with respect to (1) the alleged inadequacies of the findings of the Board as to the need for additional service on the routes in issue (see pp. 11–14 of our Memorandum in No. 777),[7] and (2) the claim

[6] A separate petition for a writ of certiorari to review the judgment in the instant case has been filed by Capitol Airways, an unsuccessful applicant for routes between Chicago and Miami and Detroit and Miami in the Board proceeding below (No. 786, this Term). The instant petition, however, presents no issues raised by Capitol. See the Board's brief in opposition in No. 786. Eastern's appeal was considered separately by the court below (see Pet. App. B 3–10) from that of Capitol (Pet. App. B 10–12).

[7] Here, the revenue and cost estimates of the parties were stated and considered (J.A. 647a–648a, 675a–680a, 710a–712a). Among other things, the Board set forth in tabular form estimates of total traffic and the participation therein by the various carriers, together with the revenues therefrom (J.A. 1480a, 1491a–1493a). Eastern's financial position was fully evaluated (J.A. 929a–931a), and it was found that the carrier would not be seriously effected by the competition. Indeed,

that the public announcement of the Board's tentative vote on instructions to its staff deprived Eastern of a fair hearing (*id.*, pp. 14–15).

Moreover, as stated in that Memorandum, we think the court below here properly rejected the so-called *Ashbacker* issue raised by petitioner's question No. 2 (Pet. 2–3, 19–22). The court correctly ruled that Eastern's failure to take advantage of the opportunity given it to introduce evidence at the hearing to support its claim that its applications, excluded from the hearing, were in fact mutually exclusive with the awards made therein, was "fatal to Eastern's *Ashbacker* contentions" (Pet. App. B 5–6). As indicated in the Memorandum, we do not think that the determination of the court below on this point was necessarily inconsistent with the determination on Eastern's similar claims in the *Delta* case, *supra*. For the holding there may well have reflected the erroneous belief of that court that the Board, in that case, had not made it sufficiently clear to the parties that failure to introduce evidence of mutual exclusivity at the hearing would forestall later claims thereon. However, should this Court grant the petition for a writ of certiorari with respect to question No. 2 in No. 777, then it should also grant certiorari here on question No. 2.

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the Board found that, because of increasing traffic growth, Eastern would still receive more revenue with competition on the basis of 1958 data than it received without competition in 1956 (J.A. 1493a). Eastern's complaint is only that the Board did not set forth in similar form the precise estimates of future expenses and capacity by Eastern and the successful applicants.

2. Petitioner's claim that a telegram, sent by General Dynamics at Capital's behest (J.A. 1498a), to advise the Board of the arrangement between General Dynamics and Capital for acquisition of aircraft, constituted an improper attempt at *ex parte* influence by Capital, was rejected by the Board (J.A. 1488a–1490a) and the court below (Pet. App. B 8–9). The Board, after fully considering the charges, expressly stated (J.A. 1489a–1490a) that the General Dynamics telegram "did not affect our decision in any way" and that "our deliberations were guided only by the record evidence." The Court of Appeals, on review of the record, found "no reason to doubt" the Board's representation that its decision "was uninfluenced by the announcement of Capital's equipment acquisition program," and "no indication that Capital made any covert communications to members of the Board" (Pet. App. B 9). The court further pointed out that the telegram did not refer to the pending *Great Lakes-Southeastern* case and that it was relevant to other pending Board matters, including the comprehensive investigation of passenger fares then pending before the Board and the question whether the financial arrangements for the proposed equipment acquisition program involved an acquisition of control of Capital which required Board approval under Section 408 of the Civil Aeronautics Act, 49 U.S.C. (1952 ed.) 488. Accordingly, Capital had valid reasons, wholly apart from the instant case, to request General Dynamics to confirm to the Board matters which were the subject of widespread comment in the trade press. See *Van Curler Broadcasting Corp.* v. *United States,* 236

F. 2d 727, 730 (C.A. D.C.), certiorari denied, 352 U.S. 935.[8]

Petitioner contends that the sending of the telegram at Capital's request also raised a question as to Capital's possible fitness to receive the award. The court of appeals held, however, that a remand to the Board to take evidence upon this question was not called for because of the absence of "indication that Capital made any covert communications to members of the Board" (Pet. App. B 9). Since this question related to facts that were known to both the agency and the reviewing court, this case is significantly different from cases such as *Sangamon Valley Television Corp.* v. *United States,* 358 U.S. 49, and *WKAT, Inc.* v. *Federal Communications Commission,* 258 F. 2d 418 (C.A. D.C.). There cases were remanded to the Federal Communications Commission to consider charges, made for the first time while it was pending before the courts, that applicants or their representatives had made covert presentations on the merits to individual commissioners.

The law with respect to the effect of *ex parte* contacts with administrative agencies during contested administrative proceedings is presently in the course of development. Of necessity, the application of

[8] There is no basis for Eastern's suggestion (Pet. 8, 32–33) that the telegram, or other publicity concerning the Capital-General Dynamics deal, was responsible for the shift in Board counsel's position back to one favoring the Capital application. On the contrary, he clearly stated at oral argument that his switch resulted from (1) Capital's withdrawal of a subsidy application and (2) the Board's approval of a 6.6% passenger fare increase which would increase Capital's revenues by about $5,000,000—both matters of official notice (J.A. 1202a–1204a).

broad general principles in this area to particular factual situations must be developed on a case-by-case basis, and such development is a matter initially for the courts of appeals. The Court of Appeals here did not purport to enunciate any novel doctrine. It merely held that, on the facts shown by this record, there was no need for further agency proceedings to develop any additional facts with respect to the sending of the General Dynamics telegram. In these circumstances, we submit that there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. However, if the Court should grant the petition with respect to the second question presented in No. 777, it should also grant the instant petition with respect to the second question presented.

Respectfully submitted.

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APRIL 1960.

U.S. GOVERNMENT PRINTING OFFICE: 1960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 785

EASTERN AIR LINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION OF DELTA AIR LINES, INC., TO BE NAMED AS A SPECIFIC PARTY RESPONDENT AND FOR LEAVE TO FILE BRIEF IN OPPOSITION

Delta Air Lines, Inc., (Delta) hereby respectfully moves that it be named as a specific party respondent in this case and for leave to file a brief in opposition to the petition for a writ of certiorari.

The interest and standing of Delta arises from the fact that it was a party to the proceeding below before the Civil Aeronautics Board (Board) wherein it was granted authority to engage in scheduled air transportation over certain routes in competition with Petitioner Eastern Air Lines, Inc. and already held authority to engage in scheduled air transportation over certain other routes for which the Petitioner unsuccessfully sought authority. Delta was also an intervenor on the side of the Board in the case below and participated

fully both on brief and in oral argument before the Court of Appeals for the Second Circuit wherein the Petitioner unsuccessfully sought to have set aside those portions of the Board's order[1] adverse to Petitioner and favorable to Delta.

Petitioner is requesting this Honorable Court to review and upon review to reverse the judgment of the Court below[2] upholding the validity of the Board's order which granted Delta favorable operating rights and denied Petitioner operating rights the grant of which would be adverse to Delta's interests. The issues of law and questions of fact raised by Petitioner directly involve Delta and accordingly, Delta has a substantial interest in the disposition of the petition for writ of certiorari.

Delta, as a party to the proceeding before the Board, as a recipient of substantial and favorable operating rights and as an intervenor in the case below would have standing to petition for a writ of certiorari under 28 U.S.C., § 1254(1) and 49 U.S.C. § 646(f) [now 49 U.S.C. § 1486(f)] in the event the Court of Appeals below had held adverse to its interest. Delta submits that it should have equal standing to defend its interests as a party respondent in the instant case where the decision of the Court below favorable to the interests of Delta is being attacked by an adverse Petitioner. Accordingly, Delta is a real party in interest and should have been named as a specific respondent in Petitioner's application to this Court for a writ of certiorari.

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[1] The opinion and order of the Civil Aeronautics Board appears at pp. 1313a-1400a of the printed joint appendix used in the Court of Appeals below.

[2] The opinion of the Court of Appeals is printed in appendix B of the Petition and is reported at 271 F. 2d 752.

On April 13, 1960, Delta filed a brief in opposition to petition for a writ of certiorari believing that it was, by reason of its participation as a party in the case before the Court below, an automatic respondent herein, the Court's rules being silent on the subject and a copy of the said petition having been served on it. Delta's said brief was timely filed and received under Rule 24 of this Court. A question has been raised in a companion Petition (No. 786) as to Delta's standing when not specifically named as a respondent herein, therefore, this motion is filed in an abundance of caution.

WHEREFORE, Delta Air Lines, Inc., respectfully requests that to the extent it is not a party respondent to this case by implication that it be named specifically as a party respondent and that the brief timely filed by it on April 13, 1960 in opposition to the petition for a writ of certiorari be received with respect thereto.

Respectfully submitted

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 785.

EASTERN AIR LINES, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

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EASTERN AIR LINES, INC.,
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v.

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Respondent.

REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI.

Introduction.

Eastern Air Lines, Inc. ("Eastern") replies herewith to briefs in opposition to certiorari filed by Capital Airlines, Inc. ("Capital"), Delta Air Lines, Inc. ("Delta"), Northwest Airlines, Inc. ("Northwest") and the Civil Aeronautics Board ("the Board" or "the CAB").[1]

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[1] Capital and Northwest have also moved to be named parties respondent and requested leave to file briefs in opposition to Eastern's petition for certiorari. Eastern does not oppose those requests.

Reference to the briefs of the parties in opposition to certiorari will be by commonly recognized abbreviations in parentheses followed by the specific page number to which reference is made, as, for example, (CAP 1), (DAL 2), (NWA 3) and (CAB 4). A reference to Eastern's petition for certiorari will be in the same form, as, for example, (EAL 5) and reference to the joint appendix in the Court below, certified to this Court will be in comparable form, as, for example, (J. A. 6a).

In its petition for certiorari, Eastern set out four questions on which certiorari was requested, namely: (1) the proper concept of public convenience and necessity as that term is used in airline route proceedings, (2) the scope and meaning of the "*Ashbacker*" doctrine,[1] (3) the practice of administrative agencies of predetermining litigated controversies by "press release" without considering all the pertinent facts, and, (4) the standards of ethical conduct required by an applicant asserting its fitness to engage in air transportation, particularly with regard to certain *ex parte* contacts made by Capital to the CAB.

Capital and Northwest allege that none of the four questions raised by Eastern warrant review by the court while Delta asserts that points one (1) and three (3) do not merit review and expresses no opinion on point four (4).[2] The Board opposes review of questions one (1), three (3) and four (4) but equivocates on the *Ashbacker* problem raised by point two (2). The Board supports the decision of the court below on *Ashbacker,* but points out that if this Court decides to review the *Ashbacker* problem in No. 777, then this case should be reviewed on that issue as well.

With respect to the first question, the parties opposing review of the standards of public convenience and necessity allege that the Board in the proceedings before it made proper findings on various recognized standards of public convenience and necessity, that the Court below sustained those findings (CAP 11-13, 18-21), (DAL 2-12), (NWA 12-

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[1] *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U. S. 327 (1945).

[2] Delta asserts (DAL 2, n. 1) concern with question two (2) ("*Ashbacker*") and states that it has addressed itself to that point in its Reply in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, No. 777 in this Court.

16), (CAB 8-9)[1]; and that there is no conflict in the decisions of the Courts of Appeal.

On *Ashbacker*, the second point, Delta expressed no views.[2] Capital alleges that there is no conflict between the decision below and the decision in other cases, and that the case below was decided on the ground Eastern did not make any showing of mutual exclusivity (CAP 14, 28-29). Northwest's position is essentially the same as that of Capital, and, additionally, Northwest asserts that any "*Ashbacker*" error in the proceedings below was obviated by a subsequent proceeding in which certain of the service issues raised by the proceeding before the Board below were again litigated (NWA 16-24). The Board says that the decision below on the *Ashbacker* question was not "necessarily inconsistent with" the decision in *Delta* v. *Civil Aeronautics Board*, the appeal of the *St. Louis-Southeast Case* to the District of Columbia Circuit (CAB 9).[3]

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[1] To establish its position on Eastern's points one (1), three (3) and four (4), the Board relies primarily upon its Memorandum filed in No. 777 in this Court. Eastern desires this Court to consider Eastern's reply dated April 18, 1960, in that case to the answers in opposition to petition for certiorari. Similar issues are presented in that case, also involving fundamental principles of due process and statutory construction in airline new route proceedings before the Board. The cases are parallel proceedings before the Board, the same issues of public convenience and necessity and of procedural due process were raised, the same arguments were made to the respective Courts of Appeal and the questions presented for certiorari by this Court are the same in both cases. The *St. Louis-Southeast Case*, CAB Docket 7735, *et al.*, was appealed to the District of Columbia Circuit and is now pending as *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, No. 777, here, as well as in the style of *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, No. 679. The *Great Lakes-Southeast Case*, CAB Docket 2396, *et al.*, was appealed to the Second Circuit and is now pending in this case and, as well, in *Capitol Airways, Inc.* v. *Civil Aeronautics Board*, No. 786.

[2] See 2, note 2, above.

[3] And now pending in this Court as Numbers 679 and 777.

On point three (3), all opposing parties assert that the Board did not prejudge the proceeding before it by issuing a "press release" decision and that the Court below properly refuted Eastern's contention (CAP 14-15, 21-23), (DAL 12-19), (NWA 24-28), (CAB 8-9).

Neither Delta nor Northwest discussed the issue of Capital's fitness raised by reason of *ex parte* contacts made by Capital's agents with the CAB. Capital asserts that the Court below fully considered the matter of its *ex parte* contacts and arrived at the right decision (CAP 24-28, 29-31). The Board appears to take the position that, on the facts shown by the record, the Court below reached the proper result (CAB 11-12).

Eastern replies, in the order in which its questions were presented in its petition for certiorari, as follows:

I.

Reply to the answers relating to adequacy of findings on the elements of the public convenience and necessity.

The question here is simple, when isolated from the confusion in which the opponents of certiorari have attempted to clothe it and, moreover, it is a matter of public concern on which enlightened guidance from this Court is desirable in the absence of any clear pronouncements from the Courts of Appeal or from the Board itself. Eastern asks this Court to declare what basic findings on the elements of the public convenience and necessity are essential to sustain a conclusion that a proposed new air service is required.[1] Eastern

[1] Eastern does not, of course, ask this Court to rule on "the sufficiency of the evidence" in the proceedings below (*cf.* CAP 11).

would agree that there have been various judicial and quasi-judicial expositions on the *elements* of the public convenience and necessity (*cf.* DAL 4-7), but Eastern respectfully submits that there is no authoritative pronouncement on what *findings* on those elements are necessary to a lawful conclusion as to the public convenience and necessity.

Findings by an administrative body on litigated issues are required to focus the attention of the body on the pertinent facts, and to provide a basis for a reviewing court to determine whether the agency discharged its discretion in the manner prescribed by law or whether it acted whimsically, arbitrarily or capriciously.

Agreeing, then, with Delta (DAL 6) that the *basic* elements of public convenience and necessity are the same as laid down by the Board in *United Air Lines, Red Bluff Operations,* I. C. A. A. 778, 779-80 (1940) (and Eastern has never contended otherwise), the question is, as Capital has suggested (CAP 8, 18), whether the "markets in question could support new and additional competitive service", whether "there was a need for competition" as proposed by the various parties. The answers are matters of fact to be resolved by the greater weight of the evidence before determining the ultimate conclusion of law on the public convenience and necessity. It is "a commonplace of public utility regulation" that "if there be only enough business to support operations by one licensee, there must be only one licensee."[1] *Delta Air Lines, Inc.* v. *Civil Aero-*

[1] Appendix C to Eastern's petition for certiorari, C 8. References to the decision of the Second Circuit below will be to the pages as printed as Appendix B to Eastern's petition for certiorari, and references to the decision of the District of Columbia Circuit in *Delta* v. *CAB* will be to the pages appearing as Appendix C to Eastern's petition, as, for example (B 10) (C 11).

nautics Board, F. 2d , 9 Ad. L. Dec. 2d 863 (D. C. Cir. 1959) (reproduced as Appendix C to Eastern's petition for certiorari). See also *Carroll Broadcasting Co.* v. *Federal Communications Commission,* 258 F. 2d 440 (D. C. Cir. 1958).

Eastern would agree and, indeed, insist, that the answer to the question whether there is a sufficient market for a second, a third, or a fourth air carrier is for the expertise of the Board. But the Board's expertise must be shown to have been rationally exercised. Obviously Eastern does not ask for "precise" (*cf.* CAB 9) dollars and cents estimates of future operating results but Eastern does submit that the Board's answer must contain a "hard core of factual possibility" (*American Airlines, Inc.* v. *Civil Aeronautics Board,* 192 F. 2d 417, 421 (D. C. Cir. 1951)). It is apparent from *Clarke* v. *United States,* 101 F. Supp. 587 (D. D. C. 1951), that the Board must make logical, supportable findings on the need for additional carriers. Surely it is not enough, as the opponents of certiorari contend, to make a mere finding as to the size of a market followed by a *conclusion* that the market is large enough to support an additional carrier *without* consideration of expenses or capacity (see, *e.g.,* CAP 8, 18, DAL 8, 10, NWA 13).[1] If the Board may use that device to

[1] An analysis of the portions of the record cited by Capital, Delta and Northwest to support their assertions that the Board made lawful "findings" that the markets proposed for new competitive service could sustain additional carriers reveals that *all* those findings relate to the *plus,* or revenue, side of the ledger, and *none* to the minus, or expense side:

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Capital	901a-907a	Examiner's Initial Decision	Size of market
Capital	922a-924a	Examiner's Initial Decision	Selection of carrier
Capital	1337a	Board's Formal Opinion	Size of market

decide new route cases, the door to abuse of the Board's power is opened wide. From the statement that "the market has x-number of passengers", the Board could conclude "it can support two carriers", or "twenty carriers", or "two hundred carriers", or any other number the Board might choose to insert. There would be no possible way for a reviewing court to determine whether the Board had exercised its power lawfully. Only *some* balancing of revenues against expenses provides a proper foundation to determine the question.

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Capital	1342a	Board's Formal Opinion	Strengthening of Capital
Capital	1490a-1493a	Order Granting and Denying Stay of Certificates	Diversion from Eastern and others*
Delta	888a-890a	Examiner's Initial Decision	Size of market
Delta	899a-901a	Examiner's Initial Decision	Size of market
Delta	925a-930a	Examiner's Initial Decision	Generalized conclusion as to diversion—no specific findings
Delta	1318a-1319a	Board's Formal Opinion	Agreement with Initial Decision
Delta	1326a-1327a	Board's Formal Opinion	Generalized conclusion that markets will support additional carriers without harm to existing carriers
Delta	1333a-1334a	Board's Formal Opinion	Size and growth of market
Delta	1472a-1477a	Order Granting and Denying Stay of Certificates	Size of market

The Board apparently tacitly concedes that findings of the sort requested by Eastern are essential,[1] since the Board attempts to show it made such findings (CAB 8, n. 7). The Board says the cost estimates of the parties were "considered"; but the *only "consideration"* given

Party asserting adequate findings	Pages of Joint Appendix Cited	CAB Document Referred to	Nature of Material Cited
Delta	1479a-1481a	Order Granting and Denying Stay of Certificates	Diversion*
Delta	1490a-1493a	Order Granting and Denying Stay of Certificates	Diversion*
Northwest....	1320a**	Board's Formal Opinion	Size and growth of market

* None of the "findings" on diversion contain any findings on capacity to be offered by the various carriers, nor the expenses to be incurred.

** Northwest's reference was to page 15210 of the record before the Board, transmitted to the Court below; that page is reproduced at page 1320a of the Joint Appendix below.

Eastern submits that without making findings on the negative side —capacity to be offered and expenses to be incurred—it is impossible to proceed logically from the finding that a given market has so many passengers to the conclusion that it will support x-number of carriers. Eastern does *not* (*cf.* DAL 11) request a "different *sort* of subsidiary finding" to support the conclusion; Eastern requests only some logically necessary finding, without which the conclusion cannot be sustained.

[1] Neither *Federal Communications Commission* v. *RCA Communications*, 346 U. S. 86 (1953), nor *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 155 F. 2d 169 (D. C. Cir. 1946), stand for the proposition that the Courts have excused any requirement for solid factual findings as urged by Eastern (*cf.* CAP 19-20, NWA 15-16, DAL 9-11). *RCA* involved an alleged requirement that findings be made on the claimed benefits of competition and it did not excuse the agency from making proper factual findings upon the economic feasibility of a proposed airline operation; there was no request in that case that findings be made comparing reve-

them was in the Examiner's *recitations* of the evidence of the parties, neither the Examiner nor the Board made any *findings* as to the costs to be experienced, nor were the costs (or capacity) ever related to expectable traffic.

II.

Reply to the answers regarding the *"Ashbacker"* doctrine.

The major matter here urged by the opponents of certiorari (CAP 13-14; NWA 19-23)[1] is that Eastern allegedly did not make a showing of mutual exclusivity before the Board and that there is therefore no conflict between the decision below and that of the District of Columbia Circuit in *Delta* v. *CAB, supra* (Appendix C to Eastern's petition).

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nues and expenses. In *United*, there was no question raised of *adequacy* of *findings* to support a conclusion that a particular service was required by the public convenience and necessity; rather all parties to the proceeding before the Board agreed that the new service was required. The appeal was taken by a disappointed applicant for the route and the issue was the Board's discretion to select between competing carrier applicants. No court has ever been asked (prior to these cases, Nos. 777 and 785 here and below) to pronounce upon the standards of legal adequacy of findings to support a conclusion that a particular service is required by the public convenience and necessity.

The opposing parties support the opinion of the Court below on the theory that in determining public convenience and necessity, and more specifically economic feasibility, an administrative agency need look *only* at the revenue possibilities and *not* at the expense possibilities. Such a radical proposition ought not, in the public interest, to be ignored by this Court. Acutely is this the case in view of the fact that if the Board's speculations are proved in actual practice to be erroneous, the mistake must be paid for out of the Federal Treasury in the form of subsidy, under section 406 of the Federal Aviation Act of 1958. Thus the public at large has a vital financial interest in being assured, through appropriate judicial directives, that the Board will carefully consider the subsidy exposure, resulting from an excess of expenses over revenues, inherent in any new competitive authorization.

[1] Compare the Board's brief (CAB 9).

Eastern has fully demonstrated the square conflict between the two decisions and respectfully refers this Court to pages 21-22 of its petition herein, page 23 of its petition in No. 777, to pages 7-11 of its reply of April 18, 1960 in No. 777, and to joint appendix 1438a-39a in this case and joint appendix 618-19 in No. 777. The conflict is there for all to see and opposing parties have not explained it away.

Eastern does, however, reply to certain misstatements contained in the footnote at page 21 and at page 22 of Northwest's answer. Northwest asserts (NWA 21, note) that in the *St. Louis Case* Eastern utilized evidence introduced by American Airlines, Inc. ("American") to make a showing of mutual exclusivity, that the Court's findings of *prima facie* mutual exclusivity had been established by American, and that (NWA 22) "the findings referred to by the District of Columbia Circuit do not appear in this record and Eastern did not attempt to make up the deficiency by introducing evidence showing economic mutual exclusivity."[1] Contrary to Northwest's contentions, the District of Columbia Circuit carefully and explicitly found that Eastern had made an independent showing of mutual exclusivity before the Board (C 19) quite apart from whatever American might have alleged, a matter treated by the Court in an entirely separate section of its opinion (C 4-C 15). The facts shown by Eastern which the District of Columbia Circuit held were an independent *prima facie*

[1] The contention that Eastern presented no evidence on mutual exclusivity is erroneous and misleading, as is the similar contention of the Board (CAB 5). It is to be noted that no one has alleged that there was *no* evidence from which findings as to mutual exclusivity could be made despite Eastern's alleged failure to present evidence. In point of fact, however, in the proceedings before the Board below Eastern *did* cross-examine Northwest's witnesses on mutual exclusivity (J. A. 175a-84a); Eastern requested subpoenas to obtain information from other parties on mutual exclusivity but the request was denied (J. A. 184a-92a, 273a); and Eastern did present arguments from stipulated factual data on the issue of mutual exclusivity (J. A. 1438a-39a).

showing of mutual exclusivity in *St. Louis* are available to this Court (see J. A. 618-19 in No. 777) and Eastern hopes they will be compared with the identical showing made by Eastern below in *Great Lakes* (J. A. 1438a-39).

Northwest also urges that Eastern subsequently was heard on the application for extension of Eastern's routes into Milwaukee and Minneapolis/St. Paul and received certain restricted authority in those markets (NWA 18-19) and that the *St. Louis Case* was overturned by the District of Columbia Court of Appeals because the Board had expanded it from a regional case into a transcontinental award (NWA 23). Northwest's contentions further illustrate the confusion attending *Ashbacker,* and, as well, the injustice perpetrated upon Eastern. Eastern *never* had a *comparative* hearing[1] with Northwest on Eastern's proposal for a one-stop Florida-Milwaukee-Minneapolis/St. Paul service via Chicago (that being the route awarded Northwest by the Board in *Great Lakes* without concurrent consideration of Eastern's application for that authority). The Board's action in the *Chicago-Milwaukee-Twin Cities Case,* CAB Docket 3207 *et al.,* CAB Order E-13890 (May 19, 1959) *establishes* that mutual exclusivity, as a matter of economic fact, existed between Eastern's excluded application (Docket 3207) and the Northwest proposal granted in *Great Lakes.* Northwest was awarded Milwaukee-Florida and Minneapolis/St. Paul-Florida authority via one stop at Chicago in *Great Lakes;* Eastern was *denied* (in *Twin Cities*) one-stop authority between Milwaukee-Florida and Minneapolis/St. Paul-Florida via Chicago. All Eastern flights in those markets serving Chicago must serve one other point as well. Moreover, in *Great Lakes,* Northwest was awarded Milwaukee-Atlanta and Minneapolis/St. Paul-

[1] The right to a fair hearing is the concern of *"Ashbacker". Delta Air Lines, Inc.* v. *Civil Aeronautics Board,* 228 F. 2d 17, 22 (D. C. Cir. 1955).

Atlanta authority via one stop at Chicago; in *Twin Cities* Eastern was *denied* one-stop authority between Milwaukee and Atlanta, and between Minneapolis/St. Paul and Atlanta. All Eastern flights in those markets *must* serve two intermediate points. Thus the license for a one-stop Milwaukee-Minneapolis/St. Paul-Florida service via Chicago and the license for one-stop Minneapolis/St. Paul-Milwaukee-Atlanta service could be awarded to only one applicant since the Board found the public convenience and necessity required only one, and accordingly Eastern has been denied fair hearing on its application.

But that is only part of the defect in Northwest's position. Northwest was awarded in *Great Lakes* a transcontinental route between Seattle, Portland and its other far western points and the Southeast and Florida via Chicago (see the Board's Joint Opinion, J. A. 1328a-30a)[1] in precisely the same manner that TWA was awarded in *St. Louis* a transcontinental West Coast-Southeast and Florida route via St. Louis. Eastern has *never* been heard on its applications to provide Seattle/Portland-Southeast/Florida service (although it asked that they be heard in the proceedings below (*cf.* NWA 8-9)), since the *Twin Cities Case* did not extend west of Minneapolis/St. Paul. However, in its Petition for Reconsideration before the Board in this case below, Eastern summarized the evidence (J. A. 1438a-39a) to show that only one carrier could be certificated to serve the Seattle/Portland-Southeast/Florida transcontinental route awarded Northwest and the Board made no adequate responsive findings. The Court below, however, ruled that Eastern had not demonstrated mutual exclusivity; but precisely the same evidence, *mutatis mutandis*, that showed

[1] See also Capital's Brief (CAP 29) pointing out that the Board recognized that Northwest received a transcontinental route.

mutual exclusively *vis-a-vis* TWA's transcontinental award in the review by the District of Columbia Circuit of the *St. Louis Case* was presented in this case below and the District of Columbia Circuit reached precisely the opposite conclusion.

Thus, so far as Northwest's contentions that Eastern has subsequently had a hearing on *part* of its excluded applications (albeit not a comparative hearing with Northwest), and that the decision of the District of Columbia in *Delta* v. *CAB, supra,* turned on the point that an area case (the *St. Louis Case*) had become a transcontinental case, are concerned, the answer is that the *Great Lakes Case* (an "area" case) became a transcontinental case, and Eastern has *never* been heard on its transcontinental application.

The matters raised by Northwest show that the circuits are in irreconcilable conflict.

III.

Reply to answers relating to the press release decision procedure.

Eastern respectfully refers this Court to the matters set forth at pages 14-15 of its reply to answers to petition for certiorari in Number 777. The contentions of others do not meet Eastern's claim that Eastern and other litigants are harmfully prejudiced by being subjected to the unauthorized and irregular press release decision procedure.[1]

[1] The "press release" procedure is not a published procedure of the Board. Compare *Columbia Research Corp.* v. *Schaffer,* 256 F. 2d 677, 680 (2d Cir. 1958) ("resort to" as used in §3(a) of the Administrative Procedure Act relieving parties from the obligation to "resort to" a procedure not published by an administrative agency means also that parties will not be held in "subjection to" procedures not published.) (Section 3(a) of the Administrative Procedure Act appears in Appendix A to Eastern's petition for certiorari.)

There has been no effective response to Eastern's showing of the invalidity of the press release decision procedure, nor to Eastern's showing that the procedure is becoming more wide-spread, affecting more litigants in quasi-judicial proceedings. Eastern believes the problem here is of far more consequence than a sterile play on words, to which Capital and Delta would relegate the point (*e.g.*, CAP 15, DAL 13, 17). The matter raised by Eastern is that of "prejudice" in its original sense—"prejudgment." In theory, of course, a prejudiced juror *could* fairly consider a case, but Eastern raises a question of basic fairness founded on the time-honored concept that prejudgments preclude fair trials. The opponents of certiorari, and the Court below (though reluctantly and doubtfully, see EAL 29, B 7), are asking this Court to put the stamp of approval on an admittedly irregular procedure of prejudgment, announcing the decision before all the pertinent facts are considered.[1] Eastern submits that no party has refuted Member Hector's carefully considered opinion that the procedure is unlawful (see EAL 26, 27, 28-30).

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[1] Eastern does not repudiate its stipulation that the Board could rely on traffic and financial data that became available up to time of final decision (*cf.* DAL 15, NWA 27). Eastern's objection is that they were not considered prior to the Board's announced prejudgment despite the fact that they were essential to construction of the formal opinion. (Northwest alleges, NWA 27, that the 1957 data *were* available to the Board before the press release; Northwest refers to certain raw material that are compiled into the final reports. The Board has never alleged that it considered the reports referred to by Northwest in arriving at its "tentative" decision, and Capital concedes that they were unavailable as Eastern had said, CAP 22, as, apparently, does Delta, DAL 15. Moreover, no party below challenged an affidavit, not printed in the record below certified to this Court, submitted by Eastern's Director of Research that the data were unavailable to the Board. That affidavit was submitted in connection with Eastern's petition for stay in the Second Circuit.) Having arrived at its decision, and publicly proclaimed it by press release, the 1957 data did not enter into the decision-making process even though they were relied upon to support the formal opinion. Eastern does not object to the Board's considering those data, it only requests that they be considered *before* the Board makes up its collective mind.

IV.

Reply to answers respecting Capital's *ex parte* contacts with the Board.

The question here is whether this Court will condone *ex parte* contacts by litigants to administrative agencies designed to influence judicial proceedings before agencies. Capital (CAP 15-17, 24-28, 29-31) and the Board (CAB 10-12) effectively ask this Court to permit administrative agencies and parties to conceal improper off-the-record actions by a simple denial that any unauthorized procedures were used.

Accepting as correct the Board's assertion (see, *e.g.*, CAB 10) that its decision was not influenced by the unlawful contacts, nevertheless the emerging law with respect to *ex parte* contacts with administrative agencies during the course of contested administrative proceedings shows that, at the very least, a hearing was required to determine whether or not improper *ex parte* contacts were actually made[1] with the intent to influence the decision.[2] Eastern submits that the question of Capital's intent in the telegram to the Board is a matter of fact to be resolved only by the Board itself, in the first instance. Capital errs

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[1] That Capital acted through an aircraft manufacturer instead of through one of its own officers is surely immaterial. A party cannot avoid the consequences of his conduct by employing an agent to act for him. Eastern assumes that the Board is not suggesting (CAB 11) that the law expressed in the television cases can be avoided by a party through the simple device of procuring covert communication through an agent. *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221 (D. C. Cir. 1959). In *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (D. C. Cir. 1958), the *ex parte* contacts were not made by an official of the applicant, but by an agent.

[2] The law on this point appears to be clear in view of *Sangamon, supra*, and *WKAT, supra*.

(CAP 16, 25) in stating there is no controversy as to the extent and nature of the communications between Capital and the Board. To be sure, the matter cannot be resolved definitely without hearing, but certainly the timing of the telegram to the Board (immediately before argument) and the controversy as to Capital's fitness to operate new routes in view of its equipment program (see EAL 32-33[1]) are such to suggest strongly that the *intent* was to influence the proceeding.

It is no answer to suggest that Capital can save itself by the fortuitous circumstance that the factual matters alleged in the telegram *might* have been relevant to other matters unrelated to the litigated controversy[2] as suggested by the Court below and by the parties (see, *e.g.*, CAB 10; CAP 16-17, 26-27). Capital disingenuously suggests that because the telegram did not refer *in haec verba* to the *Great Lakes-Southeast Case* there was no indication that

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[1] The Board (CAB 11, n. 8) misstates Eastern's recital of Bureau Counsel's activities regarding Capital. Eastern did not suggest that Bureau Counsel shifted his position *back* to favoring Capital as a result of the *ex parte* activity. Rather Eastern showed that Bureau Counsel had originally supported Capital for the route ultimately awarded it but changed his position to support another carrier as a result of discovering subsequently that Capital would *not* have adequate equipment to operate the proposed routes. The purpose of that discussion was to illustrate that Capital's fitness, *i. e.*, its equipment program, was a highly controversial issue. Eastern did not suggest that Bureau Counsel re-shifted because of the telegram; in any event, Bureau Counsel's action was irrelevant to the point here raised since he participated as an independent party, and not as a decision-maker.

[2] If the telegram was related to a pending investigation of passenger fares, then surely it was improper in view of the fact that that proceeding was one to be decided on a record after hearing and was in the process of litigation. (See EAL 34; see also CAP 17.) It is rather shocking, to say the least, that Capital (CAP 16, 26), the Board (CAB 10), and the Court below (B 9) all sought to excuse Capital in the case below by claiming that the telegram might have been a relevant, but nevertheless unauthorized *ex parte*, communication in *another* case before the Board.

it should have been considered in connection with that proceeding. However, the fact is that there was no indication that it should have been considered in connection with a possible acquisition of control situation under section 408 of the Federal Aviation Act of 1958 (or in connection with any other Board function). Indeed, on response to inquiry from the Chairman of the Civil Aeronautics Board, Capital specifically disavowed the existence of any section 408 question (see, *e.g.*, EAL 33-35). The method used by Capital to advise the Board of its equipment program was, to say the least, unique, and if Capital had intended to relate it to a section 408 proceeding, there are formal methods available by which proper application in duly authorized form may be made publicly (and, indeed, are required to be made publicly in the absence of a specific showing of the need for secrecy) for approval. There was no emergency in the matter of Capital's advising the Board of its equipment program, a fact that is easily shown since now, more than two years later, Capital *still* has not consummated the "agreement" referred to in the telegram. Certainly there was no justification for the covert communication to the Board in a dramatic telegram arriving one day before oral argument in the proceeding below. While the quite attenuated relationship alleged between the factual matters asserted in the telegram and other regulatory functions of the Board was approved by the Court below under the doctrine of *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727 (D. C. Cir.), *cert. denied,* 352 U. S. 935 (1956), an examination of that case shows that the Court below went far beyond *Van Curler* in condoning *ex parte* contracts. The operative factor in *Van Curler* was that the Federal Communications Commission had sent inquiries and solicited replies from the industry on certain pending deinter-

mixture proceedings and the alleged *ex parte* communication of Columbia Broadcasting Corporation in that case was shown to be in response to the general inquiry and not specifically related to the litigated controversy. No such facts are present to exculpate Capital in this situation and this Court is respectfully requested to redefine the limits to which a party may go in covertly communicating with an administrative agency which is deciding a litigated controversy concerning the party secretly contacting it and, moreover, to clarify the requirements that administrative agencies hold hearings to determine the fitness of applicants for new licenses resorting to such unauthorized and improper procedures.

Conclusion.

WHEREFORE, Eastern respectfully prays that the answers of the other parties hereto be denied and that a writ of certiorari issue.

Respectfully submitted,

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